TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905. 1906.

No. 228. 78.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* THE NEW AMSTERDAM GAS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE BOARD OF TAX COMMISSIONERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JULY 7, 1906.

(18,999.)

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SUPREME COURT OF THE UNITED STATES.

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No. 348.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* THE NEW AMSTERDAM GAS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE BOARD OF TAX COMMISSIONERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Remittitur from court of appeals	*a*	1
Papers on appeal to court of appeals	*c*	2
Statement	*f*	2
Petition for writ of certiorari	1	3
Exhibit A—Report of the Amsterdam Gas Co. for year ending June 30, 1899	8	7
B—Supplemental report	26	21
C—Complaint to board of tax commissioners	33	26
Order for writ of certiorari	42	32
Writ of certiorari	43	33
Return to writ of certiorari	45	34
Schedule D—Proceedings	49	37
Order of reference	59	43
Evidence before the referee	61	44
Stipulations as to evidence, &c	61	44
Colloquy between counsel and referee	63	45
Questions asked of officers	65	47
Offers of exhibits, &c	67	48
Testimony of George E. Priest	70	50
Stipulation as to testimony	102	71
Testimony of George E. Priest (recalled)	102	71

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 24, 1903.

	Original.	Print
Table of percentages offered	117	81
Objections to table of percentages	117	81
Colloquy between counsel and referee	119	82
Testimony of Frederick G. Hobbs	136	92
James L. Wells	144	100
Affidavit of Frank Bailey	149	103
Testimony of Alexander Dumas	150	104
Statement of wards Nos. 1 to 5	153	106
Stipulations as to notice, &c	156	109
Notice of assessment, &c	156	109
Statements as to facts, &c	158	110
Testimony of Frank J. Bell	161	112
Defendants rest	190	133
Testimony of Frederick G. Hobbs (recalled)	190	133
Thomas C. Smith	199	139
Tabulated statement	203	143
Plaintiff's Exhibit A—(Not set out here—see side p. 8)	209	148
B—(Not set out here—see side p. 26)	209	148
C—(Not set out here—see side p. 33)	209	148
Plaintiff's Exhibit, August 2, 1901—Original charter of New York Gas Light Co. and amendments thereto	210	148
Plaintiff's Exhibit, August 2, 1901—Original charter of Manhattan Gas Light Co. and amendments thereto	216	152
Plaintiff's Exhibit, August 2, 1901—Charter of the Metropolitan Gas Light Co	222	156
Plaintiff's Exhibit No. 1, September 4, 1901—Certificate of reorganization under general laws of 1848 of the New York Gas Light Co	228	160
Plaintiff's Exhibit No. 2, September 4, 1901—Certificate of reorganization under general laws of 1848 of the Manhattan Gas Light Co	229	161
Plaintiff's Exhibit No. 3, September 4, 1901—Certificate of incorporation of the Municipal Gas Light Co	231	162
Plaintiff's Exhibit No. 4, September 4, 1901—Certificate of incorporation of the Knickerbocker Gas Light Co	233	163
Plaintiff's Exhibit No. 5, September 4, 1901—Certificate of incorporation of the Harlem Gas Light Co	234	164
Plaintiff's Exhibit No. 6, September 4, 1901—Articles of consolidation of the Consolidated Gas Co	237	165
Plaintiff's Exhibit No. 7, September 4, 1901—Certificate of incorporation of the Equitable Gas Light Co	246	171
Plaintiff's Exhibit No. 8, September 4, 1901—Certificate of incorporation of the New York and East River Gas Co	249	173
Plaintiff's Exhibit No. 9, September 4, 1901—Certificate of incorporation of the New Amsterdam Gas Co	251	174
Plaintiff's Exhibit No. 10, September 4, 1901—Agreement between the Equitable, New York and East River and New Amsterdam Gas Cos., February 16, 1898	254	176
Plaintiff's Exhibit No. 11, September 4, 1901—Articles of incorporation of the Standard Gas Light Co	260	180
Plaintiff's Exhibit, September 4, 1901—Special law as to the Standard Gas Light Co	262	181

	Original.	Print
Plaintiff's Exhibit, September 4, 1901—Special Law as to the East River Gas Light Co.	264	183
Plaintiff's Exhibit No. 12, September 4, 1901—Certificate of incorporation of the East River Gas Light Co.	266	184
Plaintiff's Exhibit No. 13, September 4, 1901—Notice to corporations that statement of valuation of special franchise has been filed	273	189
Stipulation as to exhibits	274	189
Report of referee	275	190
Findings of fact	275	190
Conclusions of law	283	195
Opinion of referee	284	196
State constitution	284	196
Federal Constitution	306	209
Impracticability of the act	320	218
Objections not before considered	331	225
Exceptions to referee's report	339	230
Notice of trial	343	232
Decision	344	232
Findings of fact	345	233
Conclusions of law	353	238
Exceptions to decision	354	238
Final order	357	240
Notice of appeal to appellate division	360	242
Affidavit of no opinion	361	242
Stipulation waiving certification	362	243
Memorandum of decision in appellate division	363	243
Order of appellate division	364	243
Opinion in appellate division (Parker, J.)	366	245
Opinion in appellate division (Kellogg, J.)	379	252
Dissenting opinion in appellate division (Smith, J.)	386	257
Dissenting opinion in appelate division (Chester, J.)	396	262
Notice of appeal to court of appeals	405	268
Stipulation as to record on appeal	406	269
Order for judgment on remittitur	407	269
Judgment on remittitur	410	270
Writ of error	413	271
Petition for writ of error	416	272
Allowance of writ of error	417	273
Assignment of errors	419	274
Citation and service	422	275
Bond on writ of error	424	275
Clerk's certificate to record	428	279
Opinion of court of appeals	429	280
Clerk's certificate to opinion	461	303

a Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 28th day of April, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur April 29th, 1903.

b THE PEOPLE OF THE STATE OF NEW YORK on the Relation of New Amsterdam Gas Company, Respondent,
ag'st
GEORGE E. PRIEST & Ors., Tax Commissioners, Composing the State Board of Tax Commissioners, Appellants.

Be it remembered, that on the 25th day of February, in the year of our Lord one thousand nine hundred and three, George E. Priest & ors., tax commissioners, &c., the appellants in this proceeding came here into the court of appeals, by John Cunneen, attorney general, their attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the third judicial department. And New Amsterdam Gas Company, relator, the respondent in said proceeding, afterwards appeared in said court of appeals by John C. Tomlinson, its attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed

c Whereupon, the said court of appeals having heard this proceeding argued by Mr. John Cunneen, attorney, and Mr. Wm. H. Wood, of counsel for the appellants, and by Mr. John C. Tomlinson and Mr. David B. Hill, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is reversed, and that of special term affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

d Therefore, it is considered that the said order be and the same hereby is, reversed, &c., &c., as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and

provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *April 29th*, 1903.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said proceeding in the court of appeals, with the papers originally filed therein attached thereto.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND, *Clerk.*

e Original.

Filed Feb. 25, 1903.

In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERDAM Gas Company, Respondent,
against
STATE BOARD OF TAX COMMISSIONERS, Appellants.

Papers on Appeal.

John Cunneen, attorney-general, attorney for appellants, capitol, Albany, N. Y.

John C. Tomlinson, attorney for relator-respondent, 15 Wall street, borough of Manhattan, New York city.

Filed Feb. 25 1903.

Filed Albany county, N. Y. May 1 11.22 a. m. 1903 clerk's office.

f In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERDAM Gas Company, Respondent,
against
STATE BOARD OF TAX COMMISSIONERS, Appellants.

Statement.

Appeal from an order of the appellate division of the supreme court, third department, granted on January 6, 1903, and entered in the Albany county clerk's office on January 30, 1903, except from that part of said order which affirms the order of the special term therein upon the facts. The order appealed from affirms on the

facts and reverses on the law an order of the special term made by Mr. Justice Herrick, and entered on October 25, 1902, confirming the report of the referee, Hon. Robert Earl, now deceased, and declares the assessment in question to be illegal and void, and directs it to be stricken from the assessment roll.

The report of the referee directed that the assessment of the special franchise of the relator be reduced, in the borough of Queens, to $293,081, and, in the borough of Mahattan, to $2,672,751.94, and, as so reduced, be confirmed.

g The order of reference directed the referee to take and report to the court such evidence, upon the several issues of fact raised by the pleadings, as might be adduced before him, with his findings of fact and conclusions of law.

The names of the original parties hereto are as above, and no change in them or their attorneys has taken place.

1 *Petition for Writ of Certiorari.*

Supreme Court, County of Albany.

THE PEOPLE *ex Rel.* THE NEW AMSTERDAM GAS COMPANY
against
GEORGE PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Constituting the State Board of Tax Commissioners.

To the supreme court of the State of New York:

The petition of the New Amsterdam Gas Company respectfully shows to this court:

I. That your petitioner, The New Amsterdam Gas Company, is a domestic corporation organized and existing under the laws of the State of New York, and having its principal office at No. 340 Third avenue, in the borough of Manhattan, city of New York.

II. That the respondents, George Priest, J. Edgar Leaycraft and Lester F. Stearns, constitute the State Board of Tax Commissioners of the State of New York, and as such claim to have been empowered under an act entitled "An act to amend the tax law in relation to the taxation of public franchises as real property," passed May 26, 1899, being chapter 712 of the Laws of 1899, to annually fix and determine the valuation of each special franchise subject to assessment in each city, village or tax district within the State of New York, as provided by said act, and among others the special franchise of your petitioner for the purpose of taxation in the boroughs of Manhattan and Queens, in the city of New York.

2

III. That your petitioner, The New Amsterdam Gas Company, is the owner of certain gas-mains in the streets of the borough of Manhattan, in the city of New York.

IV. That pursuant to the request of the State Board of Tax Commissioners on or about October 31, 1899, and within thirty days

after said chapter 712 of the Laws of 1899 took effect, your petitioner, The New Amsterdam Gas Company, made a written report to the said State Board of Tax Commissioners containing a full description of every special franchise possessed or enjoyed by your petitioner, together with a copy of or reference to any special law, grant, ordinance or contract under which the same was held; and also a statement of any condition, obligation or burden imposed upon such special franchise, or under which the same was enjoyed, which report had annexed thereto the affidavit of the officers of your petitioner to the effect that the statements therein contained were true, as provided by said act; and your petitioner annexes hereto and makes a part of this, its said petition, a copy of the report so made by and it and marks the same "Exhibit A" and prays leave to refer to the same as though set out herein at length.

V. That your petitioner, after making and filing the report hereinbefore last referred to, did make a further and supplemental report to said State Board of Tax Commissioners answering fully and to the best of its ability the questions in said report contained, a copy of which supplemental report is hereunto annexed and
3 made a part hereof and marked "Exhibit B," and your petitioner prays leave to refer to said supplemental report with the same force and effect as though set out herein at length.

VI. That thereafter and on or about the 20th day of March, 1900, your petitioner received a notice from the said State Board of Tax Commissioners to the effect that under the provisions of the tax law relating to the taxation of public franchises as real property, the said State Board of Tax Commissioners had made an assessment upon special franchises constructed, maintained or operated by you rpetitioner and fixed the total valuation thereof as follows upon such special franchise constructed, maintained or operated by your petitioner in the borough of Queens, city of York, $455,000, and in the borough of Manhattan, city of New York, $5,106,750, making a total of $5,561,750; and notified your petitioner that said board would meet at its office in the city of Albany on the 10th day of April, 1900, at 10 o'clock a. m., to hear and determine any complaint concerning such assessment, and thereafter said board adjourned said hearing until the — day of April, 1900.

VII. That thereafter and on the — day of April, 1900, your petitioner being grieved at such assessments made by said State Board of Tax Commissioners upon the special franchises constructed, maintained or operated by it as hereinbefore stated, appeared before the said State Board of Tax Commissioners, and presented its written and duly verified complaint, a copy of which is hereunto annexed and made a part hereof, and marked "Exhibit C," and your petitioner prays leave to refer to the same as though herein set out at length.

VIII. That thereafter and on or about the 28th day of April, 1900, your petitioner received a notice from the said State Board of Tax Commissioners to the effect that said board had filed with the
4 department of taxes and assessments in the city of New York a statement of the valuation of special franchises constructed,

maintained or operated by your petitioner in the borough of Queens pursuant to the provisions of the tax law relating to the taxation of public franchises as real property at the sum of $437,433, and in the borough of Manhattan at the sum of $3,989,182, making a total of $4,426,615; and that under the provisions of the said act it was the duty of the local assessors to place the assessments for such special franchises on the assessment roll in said city in the appropriate columns.

IX. That your petitioner is aggrieved by the said assessments made as aforesaid, and is and will be injured thereby and complains of the said assessments and valuations, and alleges that they are illegal, that they are erroneous by reason of over-valuation, and that said assessments are unequal in that the assessments have been made a higher proportionate valuation than assessments of other property on the same roll.

X. That the said assessments are illegal because property of your petitioner has been assessed and valued as a special franchise which is not taxable as such.

XI. Your petitioner further alleges that its special franchise, so-called, if taxable at all should not have been valued at any sum whatsoever, for the reasons set out at length in the complaint of your petitioner filed with the State Board of Tax Commissioners, a copy which is hereunto annexed and marked "Exhibit C" as aforesaid, and your petitioner craves leave to refer to and make a part hereof the allegations and statements in said exhibit contained with the same force and effect as though herein set out at length, and your petitioner alleges that the extent of the over-valuation of said special franchises is the sum of $4,426,615.

XII. Your petitioner further alleges that the great bulk of real estate in the city of New York, including the various boroughs thereof, is valued for taxation by the various officials and employees of the city charged with that duty in the premises, at less than seventy per cent. of its actual market value. That this habit has prevailed for many years and is still continued, and specifies as instances, real estate in the boroughs of Manhattan, Brooklyn, Bronx, Richmond and Queens, alleging that throughout these boroughs property is and has been habitually assessed at less than seventy per cent. of its market value.

XIII. And your petitioner further alleges that it is informed and believes that the sum of $4,426,615, which the said State Board of Tax Commissioners fixed as the valuation of the special franchises constructed, maintained and operated by your petitioner in the boroughs of Queens and Manhattan, in the city of New York, was in their judgment the actual and market value thereof. That if they had assessed said property at seventy per cent. of what they regarded as the market value thereof, which they should have done to make the assessment compare with the assessments upon real estate, said assessment would have been but $3,098,630.50. That for the reason aforesaid the valuation and assessment so made by said State Board of Tax Commissioners is at a higher proportionate

valuation than other real property on the same roll, and your petitioner is and will be injured by said erroneous and unequal valuation and assessment.

XIV. And your petitioner further says that said assessment and valuation is unequal, unfair and unjust because the said State Board of Tax Commissioners have, in valuing the franchise of your petitioner, disregarded the fact that these franchises have proved of no value to it and that it has made no profit from the exercise thereof, but on the contrary have assessed the franchises of your petitioner at as high a valuation as the franchises of corporations engaged in the same character of business but whose operation has proved a profit and earned large returns for its stockholders.

Wherefore your petitioner prays that a writ of certiorari
6 may be issued and allowed by this court directed to George Priest, J. Edgar Leaycraft and Lester F. Stearns, constituting the State Board of Tax Commissioners of the State of New York, commanding them to certify and return to this court all and singular their proceedings, decisions and actions in the premises, with the reasons therefor, and the dates thereof respectfully, and all and singular said assessments, documents, records, memoranda and papers before them touching or concerning the valuation for assessment or taxation of the said special franchises constructed, maintained or operated by your petitioner, in the boroughs of Queens and Manhattan, in the city of New York, and touching or concerning the valuation or assessment of the gas mains and pipes of your petitioner in the boroughs aforesaid, or in anywise having respect thereof; and to return by what authority they have made said assessments or valuations, or that such evidence may be taken as the court may direct, or that a referee may be appointed to take such evidence and to report the same to the court; and that the decisions and actions of the said Board of Tax Commissioners may be reviewed or corrected on the merits by this court, and that the aforesaid errors of said commissioners may be corrected according to law, and that the aforesaid assessments on the special franchises constructed, maintained or operated by your petitioner may be set aside and vacated or reduced, and that your petitioner may have such other or further relief as may be just.

NEW AMSTERDAM GAS CO.,
By JAMES JOURDAN, *President.*

Attest:
FORD HUNTINGTON, *Sec'y.*

7 STATE OF NEW YORK, }
Borough of Manhattan, } *ss.:*

On the 10th day of June, in the year one thousand nine hundred, before me came James Jourdan, to me known and with whom I am personally acquainted, who, being by me duly sworn, did depose and say, that he resides in the borough of Brooklyn, city of New York, and is the president of the New Amsterdam Gas Company,

the corporation described in and who executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to the above instrument is such corporate seal, and the same was affixed thereto by order of the board of directors of said corporation, and that he signed his name thereto as president by like authority and direction.

And the said James Jourdan, being by me duly sworn, did depose and say, that the foregoing petition is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

[SEAL.] JAMES JOURDAN.

Sworn to before me this 10th day of July, 1900.

J. D. CARROLL,
Notary Public, Kings County.

Certificate filed in New York county.

8 "EXHIBIT A."

Report of the New Amsterdam Gas Co., 340 Third Ave., N. Y. C., to the State Board of Tax Commissioners of the State of New York for the Year Ending June 30, 1899.

Office of the State Board of Tax Commissioners.

ALBANY, *October 1st*, 1899.

SIR: The following forms, prepared in conformity with the requirements of law, are forwarded you for use in preparing the report of your company required by chapter 712, Laws 1899, a copy of which is enclosed herewith.

It is requested that you complete and forward such report within thirty days, as required by that act

Very respectfully,

STATE BOARD OF TAX COMMISSIONERS.

Extract from Law Relating to Taxation of Special Franchises.

SECTION 1. Subdivision three of section two of the tax law is hereby amended to read as follows:

3. The terms "land," "real estate," and "real property," as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and
9 superstructures erected upon, under, or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and in-

closures for electrical conductors and other appurtenances upon, above and under ground; all surface, underground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground, all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic, or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the State. A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a "special franchise." A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.

10 SCHEDULE A.

Title of company, New Amsterdam Gas Co.
General offices at 340 Third Ave.
Date of close of fiscal year, December 31st, 1899.
For information concerning this report address Ford Huntington, 340 Third Ave.

Officers of the company with address.

President, General James Jourdan, 340 Third Ave.
Vice-president, none.
Secretary-treasurer, Ford Huntington, 340 Third Ave.
General manager, none.

SCHEDULE B.

Description of special franchise showing streets, highways or public places possessed or rights enjoyed and in what village, tax district, or districts, same is located and statement of maps accompanying this report.

This company has the right to lay mains, pipes and conductors in all streets and avenues in the former city of New York, Long Island City and the town of Newtown.

Maps and list of mains attached.

The East River Gas Company of Long Island City makes no report for the reason that this company is owned, controlled and operated by the New Amsterdam Gas Company and is included in this report.

(Signed) FORD HUNTINGTON,
Secretary and Treasurer.

This report should be accompanied by maps showing the location and extent of all property subject to taxation as a "special franchise."

11 *Permission Given to the Equitable Gas-light Company of New York for the Laying of Its Mains and Pipes in the Streets of This City.*

Whereas, the following resolution has been adopted by the common council, viz.:

Resolved, That permission be and is hereby given to all incorporated gas-light companies to lay gas mains and pipes in the streets, avenues and public places of this city, for the purpose of supplying gas to this city and its inhabitants upon such conditions as may be prescribed and approved by his honor the mayor, the comptroller and the commissioner of public works, who are now by law authorized to make provision for lighting the streets of the city.

Adopted by the board of aldermen, December 21, 1876.

Approved by the mayor, December 23, 1876.

And whereas, the Equitable Gas-light Company of New York (a company duly incorporated under the laws of the State of New York) has made application, in writing, for permission to lay gas mains and pipes in the streets, avenues and public places of this city, upon such conditions as may be prescribed and approved, as in said resolution provided;

Now we, the mayor, comptroller and commissioner of public works of the city of New York, in pursuance of the foregoing resolution, do hereby prescribe, approve and establish the following as the conditions upon which the said Equitable Gas-light Company of

New York may lay its gas mains and pipes in the streets, avenues and public places in the city of New York, for the purpose of supplying gas to the city and its inhabitants, to wit:

1. That the manufactory or works for the purpose of pro-
12 ducing and furnishing gas shall be so constructed as not to be in any way detrimental to the public health nor otherwise create a nuisance.

2. That the gas furnished shall be of the best quality of illuminating gas, and of an illuminating power not less than twenty-five candles when tested at a distance of not less than one mile from the place of manufacture; and, as regards purity, the gas shall be free within limits not injurious to the public health, from ammonia, sulphuretted hydrogen and other sulphur and noxious compounds.

3. That gas shall be supplied to the public lamps situated on the line or lines of the mains of said company, and said lamps shall be lighted, when required by the city, at a rate not to exceed the maximum of twelve dollars for each lamp burning four thousand hours, and consuming gas through a burner consuming three feet of gas per hour under a pressure of one inch; the said rate to include the gas, lighting, extinguishing, cleaning, repairing and painting lamp-posts and lanterns, replacing the cocks, tubes, cross-heads, lamp irons and lanterns; also that the prices for fitting up and repairing lamp-posts, which may at any time be required, shall not exceed the following rates, to wit:

For fitting up each lamp-post, ten dollars.
For straightening each lamp-post, one dollar and fifty cents.
For releasing each column, one dollar and fifty cents.
For refitting each column, three dollars and fifty cents.
For removing each lamp-post, three dollars and fifty cents.
For resetting each lamp-post, ten dollars.

And whenever the mayor, comptroller and commissioner
13 of public works shall issue a call for proposals or estimates for supplying illuminating gas to and for lighting and maintaining the public lamps, then the Equitable Gas-light Company, or its successors, shall submit to said officers an estimate or proposal for furnishing the gas and lighting and maintaining such of the public lamps as are situated on the line or lines of the gas-mains of said company, at rates not to exceed the rates specified in this condition.

4. That if, at any time during the continuance of the permission given under the resolution of the common council of said city, adopted by the board of aldermen, December 21st, 1876, and approved by the mayor December 23d, 1876, it shall be considered by the commissioner of public works that the cost of production or manufacture of gas shall be reduced to an extent to admit of the lighting of public lamps at a rate less than twelve dollars per annum, then and in that case arbiters shall be appointed, one by the mayor, comptroller and commissioner of public works (parties of the first part), and the other by the said company (parties of the second part), and the two so appointed to designate a third,

which three shall determine upon a fair and equitable rate below the said twelve dollars.

5. That gas shall be supplied to the public buildings, markets, armories or offices of the corporation of the city of New York, situated on the line or lines of the mains of said company whenever said company may be required so to do by the proper officer or officers of said city, at a rate not to exceed one dollar and fifty cents per one thousand cubic feet, and whenever the commissioner of public works, or the commissioner or commissioners of any department of the city shall issue a call for proposals or estimates for furnishing illuminating gas to any of the public buildings, markets, armories or offices of the corporation of the city of New York, then the Equitable Gas Light Company or its successors shall submit to said commissioner or commissioners an estimate or proposal for furnishing gas to such of the buildings as are situated on
14 the line or lines of the mains of said company at a rate not to exceed the rate specified in this condition.

6. That gas shall be supplied to all persons residing or doing business on the line or lines of the mains of said company, who may desire the same, at a rate not to exceed one dollar and seventy-five cents per one thousand cubic feet, and no consumer shall be deprived of gas upon refusal to pay or in consequence of or on account of a dispute as to the bill rendered until such consumer shall have been served with an affidavit of the inspector of said company as to the correctness of the register of the meter through which such gas passed, provided that leaving such affidavit upon the premises where gas has been furnished with some person of suitable age and discretion, shall be sufficient service thereof on such consumer.

7. That the common council of the city of New York, or the commissioner of public works, shall have the right to order the mains or pipes of said company to be extended in or along any of the streets, avenues or public places of the city, provided that said company shall not be compelled to expend in the laying of said mains or pipes a yearly sum exceeding twenty thousand dollars.

8. The gas mains or pipes shall be laid so as not to interfere with the public sewers or sewer connections, or with the Croton water mains or water connections which are now laid or may hereafter be laid in any of the avenues, streets or public places of this city.

All trenches or excavations shall be filled immediately after the mains or pipes shall be laid, the earth to be thoroughly rammed as the same is thrown into the trench or excavation, and the pavement to be replaced in a good and workmanlike manner and to the entire satisfaction of the commissioner of public works, and shall be maintained in good order by the Equitable Gas Light Company, or its successors, for the term of one year after such pavement shall have been relaid, and in case the said company, or its successors, shall fail or neglect to replace the pavement or
15 pavements or to keep the same in good order for one year to the satisfaction of the commissioner of public works, then the

commissioner of public works shall have the right to cause such pavement to be taken up and replaced in a good and workmanlike manner by a person appointed by the said commissioner for that purpose, and the expense of such repaving shall be paid by the said company to the comptroller as a special deposit for repairs, subject to the order of the commissioner of public works. No pavement shall be removed or opening in any of the public streets or places for the purpose of laying mains or pipes until the said company shall have made application to the commissioner of public works for a permit for laying such mains or pipes, nor until a permit shall have been obtained from the said commissioner authorizing the removal of the pavement and the opening of the street.

Said company shall also be governed by the laws and ordinances of the common council of the city of New York and by such rules and regulations as the commissioner of public works, his successor or successors in office may prescribe for the laying of mains or pipes and the proper protection for filling of the trenches or excavation, for the taking up, for replacing and repaving of the pavements, and the lighting, care and maintenance of the public lamps.

9. The Equitable Gas Light Company, or its successor, shall render a report weekly to the commissioner of public works of all openings made in the pavements during the preceding week, such report to cover all openings made for the laying or repairing of service pipes, the repairing of gas mains, or the discovery and stoppage of leaks. It shall also render a report monthly, of all the gas mains laid during the preceding month, stating on which side of the street the mains were laid and from and to what streets, the distance from the curb, the depth of the trench and the diameter of the mains laid.

16 10. The Equitable Gas Light Company, or its successors, shall commence the erection of gas works within six months from the date of the signing of these conditions, and shall not lay more than one mile of gas main until it shall have expended not less than two hundred thousand dollars in the construction of such works before the laying of gas mains shall be commenced.

11. The Equitable Gas Light Company, or its successors, shall commence the manufacture and distribution of illuminating gas within two years from the date of the signing of these conditions.

12. The permission given by the said resolution of the common council, unless sooner revoked as hereinafter provided, shall continue for the period of thirty years from the date of the signing of these conditions by the mayor, the comptroller and commissioner of public works, provided all the conditions herein prescribed shall be fully performed by said company. Neither said permission nor any right conferred on said company by the said resolution shall be assigned or transferred without the previous consent of the mayor, comptroller and commissioner of public works.

13. The common council may repeal, annul and revoke the said resolution or the permission thereby given upon the failure of the said company to perform any of the conditions herein contained,

thereupon all rights of said company under said resolution and these conditions shall cease and said company shall thereupon, when ordered so to do, remove all its pipes and mains from the streets, avenues and public places of the city.

14. That it shall be expressly provided that nothing herein nor in said resolution contained shall be construed as granting to said company any sole or exclusive right or privilege or as preventing the granting privileges similar to these hereby and by said resolution given to any other company, person or parties whatsoever or as preventing any person or persons from erecting in or upon his or their own premises any building or apparatus to light with gas his or their own houses, stores, manufactory or premises.

15. The said Equitable Gas Light Company, its successor or successors, shall pay into the city treasury the sum of twenty cents for every lineal foot of trench opened for mains, such sum to be paid monthly and be accompanied by the certificate of the commissioner of public works; the sum paid is full payment at such rate for all trenches for mains opened during the month for which such payment is made.

16. The Equitable Gas Light Company, its successor or successors, shall not make or enter into any combination, arrangement or agreement with any other company or companies in regard to the amount of gas mains to be laid or to the streets in which mains are to be laid, nor in regard to the quanty of illuminating gas to be manufactured or to the price for which gas is to be sold exceeding the prices fixed in these conditions, and in the event of their so doing this permission shall *ipso facto* become null and void.

17. The permission given in the said resolution of the common council shall not become operative or take effect until the Equitable Gas Light Company shall have signified in writing and over its corporate seal, its assent to an acceptance of each and all of the conditions herein prescribed and such assent shall be given to the mayor, comptroller and commissioner of public works within thirty days after having been served with a copy of these conditions.

18. The grant or franchise to be approved by the counsel to the corporation in triplicate and shall be signed by the mayor, comptroller and commissioner of public works on behalf of the mayor, aldermen and commonalty and by the president and secretary of the Equitable Gas Light Company, with the corporate seal on behalf of said company.

Dated New York, the 26th day of December, 1882.

W. R. GRACE, *Mayor.*
ALLAN CAMPBELL,
Comptroller.
HUBERT O. THOMPSON,
Commissioner of Public Works.

The New Amsterdam Gas Company was formed by the consolidation of the Equitable Gas Light Company of New York and the New York and East River Gas Company, March 5, 1898.

The franchise of the Equitable Gas Light Company, as fixed by the gas commission, required this company to pay to the city at the rate of twenty cents for each lineal foot of main laid. It is also compelled to light the public street lamps situated on the lines of its mains at the rate not to exceed $12 per year for each lamp.

The East River Gas Company is required by its franchise (chapter 338 of the Laws of 1892) to pay annually into the city treasury three per centum of its gross receipts from gas furnished by it to private and public buildings in the city of New York.

Copy of the legislative franchise of the East River Gas Company.

Chapter 338.

(Laws of 1892, State of New York.)

19 An act to authorize the East River Gas Company of Long Island City to supply gas and electricity in the city of New York.

(Approved by the governor April 19th, 1892. Passed. Three-fifths being present.)

The People of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The East River Gas Company of Long Island City shall have the right, and is hereby empowered, to supply gas and electricity in the city of New York, and for that purpose is hereby authorized, without other or further authority of law or ordinance, to lay and maintain requisite conductors, mains and pipes through and under any streets, avenues or public places of such city. And for the purpose aforesaid such corporation shall have the right, and is hereby empowered, to lay and maintain such conductors, mains and pipes under and across the East river and across any intervening land belonging to the city of New York, or to private persons at such places as it may determine; provided, however, that such conductors, mains or pipes shall be so laid and maintained as not to obstruct or impair navigation, commerce or anchorage of any navigable waters without the consent of the Secretary of War. And such corporation shall have the right, and is hereby empowered to acquire by condemnation or purchase, such real property, public or private, or right, interest or easement therein, for the laying and maintaining of its mains, pipes and conductors as may be necessary in the exercise of the powers hereby conferred. Such property, when so acquired, shall be deemed to have been acquired and held as and for a public use.

Such corporation shall pay annually into the treasury of the city

of New York to the credit of the sinking fund thereof, three per centum of its gross receipts from gas furnished by it to private and public buildings in the city of New York through mains laid by it as herein authorized, under the streets or avenues of such city. Such payments shall be made on the first day of November in each and every year for and during the year ending on the next preceding thirtieth day of September.

2. The East River Gas Company of Long Island City shall conform to all such general and private and local laws in regard to the laying and maintaining of electrical conductors as are applicable in the city of New York, and in the laying and maintaining of its gas pipes, and mains and conductors shall be subject to only such regulations not inconsistent with the authority aforesaid as may, from time to time, be prescribed by the department of public works of such city.

3. Said corporation shall have the right to supply gas and electricity to any other company or companies engaged in supplying gas or electricity in the city of New York.

4. For the purpose of this act the said East River Gas Company shall have the right, and is hereby empowered, to lease any property of any other company or companies engaged in supplying gas or electricity in the city of New York, upon such terms as shall be agreed by the boards of directors and trustees of the respective contracting companies, and be assented to in writing by stockholders of each of such companies holding at least two-thirds of the capital stock of their companies respectively.

5. Nothing herein shall authorize any increase in the price of gas now authorized to be charged in the city of New York. And the said corporation may continue to charge for gas in Long Island City the price now authorized by law therein.

6. All acts or parts of acts, general, private or local, inconsistent with, impairing or limiting the rights or powers conferred by this act, so far as they are inconsistent with, impair, limit or impose other additional conditions upon the exercise of such rights or powers are, as to the East River Gas Company of Long Island City, hereby revoked.

7. This act shall take effect immediately.

SCHEDULE D.

Statement of Assets and Liabilities June 30, 1899.

Assets.	Amount.	Liabilities.	Amount.
Cost of real estate & improvem'ts.....	$25,729,077.68	Capital stock.....	$21,132,200.00
Cost of equipment & const.....	445,679.52	Funded debt.....	17,945,000.00
Stock & bonds of other companies.....	12,240,000.00	Accounts and bills payable.....	302,977.76
Material and supplies.....	120,379.63	Int. on funded debt due & accr'd.....	70,833.32
Accounts and bills receivable.....	456,772.99	Dividends unpaid.....	.....
Cash on hand..... ...	219,888.99	Rentals due and accrued.....	.....
Profit and loss.....	239,212.27	Profit and loss.....	.....
Total.....	$39,451,011.08	Total.....	$39,451,011.08

1. It is impossible to state the cash cost of the real estate and improvements of the company. The real estate and improvements were acquired from pre-existing corporations and paid for by the issue of New Amsterdam stock and bonds aggregating at par the sum of $25,729,077.68.

CAPITAL STOCK—SCHEDULE E.

	No. shares.	Total par value.	Dividends declared during year.		Market value during year.		
			Rate.	Amount.	Highest.	Lowest.	Present.
Common issued	121,322	$12,132,200 00	None		40	26	30
Preferred issued	90,000	9,000,000 00	None		70	56	65
Total	211,322	$21,132,200 00					

FUNDED DEBT—SCHEDULE F.

Designation of lien.	Date.	Maturity.	Amount outstanding.	Interest.		Market value during year.		
				Rate.	When payable.	Highest.	Lowest.	Present.
N. A. 1st con. mtg	1898	1948	$8,825,000 00	5 %	J. & J.	105	95	100
N. Y. & E. R. 1st mtg. &	1894	1944	5,000,000 00	5 %	J. & J.	112	110	112
1st con.	1895	1945	1,000,000 00	6 %	F. & D.	102	100	100
Equit. 1st mtg	1884	1899	2,500,000 00	5 %	M. & S.	127	115	118
1st con.	1892	1932	500,000 00	5 %	M. & N.	100	100	100
C. of I. C. of I			120,000 00	4½ %	J. & J.			
P. M. M., P. M. M.								

23 *Statement of Receipts and Disbursements for Year Ending June 30, 1899.*

SCHEDULE G.

Receipts.	Amount.
From actual operation	$1,843,279 57
Interest and dividends	4,100 38
Rentals	.....
Other sources	386,204 80
Sales of stocks and bonds	817,832 50
Temporary loans	.....
Deficit	.....
Total	$3,051,417 25

Disbursements.	Amount.
Salaries of general officers and clerks	$34,851 22 opr
Law expenses	12,908 62 opr
Other general expenses	1,357,467 07 opr
Maintenance and reconstruction or new construction paid from earnings	.....
Maintenance, reconstruction or new construction paid from other sources	434,026 34
Rentals	.....
Interest paid	900,625 33
Taxes on capital stock and earnings	32,916 57 opr
Taxes on property in this State	75,267 92 opr
Taxes on property in other States	.....
Dividends paid — % common stock	.....
Dividends paid — % preferred stock	.....
Surplus	203,354 18
	$2,848,063 07
	$3,051,417 25

Statement of Cost, Value on Basis of Reproduction and Assessment of Real Estate in Each Tax District.

* Name of tax district wherein located. (Give village, if one, and county.)	Cost of tangible real property included in "special franchise."	Value of tangible real property included in "special franchise" on basis of cost of reproduction.	Cost of real property not included in "special franchise."	Value of real property not included in "special franchise" on basis of cost of reproduction.	Last assessment of real property included in "special franchise." †	Last assessment of real property not in connection with "special franchise." †	Give total number of miles of tracks and sidings, or wires, cables, or other conductors, or of main pipes and number of service pipes, as the case may be, in, upon, under, or over streets and highways in each tax district.
Borough of Manhattan	Unable to give	Unable to give.	Unable to give.	Unable to give.			267 miles 2,642 ft. pipe
" Queens	" "	" "	" "	" "	$1,722,000 00	$1,506,000 00	38 " 4,804 " pipe
" Manhattan					765,850 00	170,000 00	3,760 ft. services
" Queens							3,295 ft. services
Total							

* Name of each tax district in which assessments are made for real estate.
† Give facts in this column when such property has been separately assessed.

25 *Detailed Statement of Shares of Stock Actually Owned in Other Corporations which are Taxable on Their Capital Stock, and All Other Non-taxable Securities Owned.*

SCHEDULE L.

Description.	Amount.
New York Carbide & Acetylene Co	$7,000,000 00
Central Union Gas Co	3,500,000 00
Northern Union Gas Co	740,000 00
East River Gas Co. of L. I. City	1,000,000 00
Total	$12,240,000 00
Valuable of tangible personal property	Unable to state.
Total assessment of personal property	$291,400 00

The law requires that every report made under this section shall have annexed thereto the affidavit of the president, vice-president, secretary, or treasurer of the association or corporation, or one of the persons or one of the members of the co-partnership making the same.

STATE OF NEW YORK, }
County of N. Y., } ss:

Ford Huntington, secretary of the New Amsterdam Gas Co., being duly sworn, deposes and says that the foregoing statements have been compiled from the books and records of this company, and after careful examination of the same, declares them to be a true, full and correct statement of the property of said company and the value thereof at the close of the year ending June 30, 1899, as well as of its financial condition and affairs on the said date, and
26 a like true, full and correct statement of the real property of said company on the first day of October, 1899, to the best of my knowledge and belief.

(Signed) FORD HUNTINGTON,
[L. S.] *Secretary.*

Subscribed and sworn to before me, this 31st day of Oct., 1899.

(Signed) J. P. MILLER,
Notary Public, —— County, N. Y.

"EXHIBIT B."

Form 12. *a*482.

SUPPLEMENTAL REPORT

OF THE

....

....

TO THE

STATE BOARD OF TAX COMMISSIONERS

OF THE

STATE OF NEW YORK.

To New Amsterdam Gas Company:

Pursuant to the provisions of section 43, chapter 712, Laws of 1899, you are requested to make and file a supplemental report of the matters contained in the within blank, and return to this office on or before —— — 1900.

Yours very truly,

STATE BOARD OF TAX COMMISSIONERS.

27 EXHIBIT B.

(Copy.)

Disbursements of Earnings for Year Ending June 30, 1899.

Operating expenses paid from earnings.....	$1,513,411 40
Maintenance } Included in oper. Reconstruction }	Including in operating expenses.
New construction (extension) paid from earnings..... (Number of miles of latter, none.)	None
Total.....	$1,513,411 40

Itemize all sums paid in nature of local tax:

Percentage on gross earnings paid to municipality, 3% on gross receipts, gas through E. R. G. Co. of L. I. City mains in N. Y. city.....	$16,000 00
Total amount paid for taxes, percentages, licenses, etc., etc.....	150,000 00

See copy of letter written to Peter Deyo.

28 Form 2. 24145.

Tax district ——.

SUPPLEMENTAL REPORT Gas.

OF THE

....

....

OF

TANGIBLE REAL PROPERTY

Located in, upon, under, or above streets, highways, and public places, including public parks, public docks, and public buildings.

To New Amsterdam Gas Co.:

Pursuant to the provisions of section 43, chapter 712, Laws of 1899, you are requested to make and file a supplemental report of the matters contained in the within blank, and return to this office on or before —— —.

Yours very truly,

STATE BOARD OF TAX COMMISSIONERS.

Diameter of pipe or tube.	Cast iron pipe.				Steel and wrought iron pipe.				Valves and boxes.				Street lamps.	
	Miles.	Age.	Miles laid since last tax assessment.	Kind of paving.	Miles.	Age.	Miles laid since last tax assessment.	Kind of paving.	Number.	Size.	Age.	Number set since last tax assessment.	Total number.	Number erected since last tax assessment.
3	7 4960			Granite, asphalt, old & unpaved streets.										
4	10 1339	822 ft.							1	6′				
6	12 1746	414 ft.										None		
8	2 755													
10	21 25 ft.								1	12				
12	4 2582													
16	780 ft.													

Total original cost of property described above laid complete, $ unable to give. Acquired by consolidation. Total present value based on cost of reproduction, unable to state.

STATE OF NEW YORK, }
County of N. Y., } ss.:

Ford Huntington, secretary of the New Amsterdam Gas Company, being duly sworn, deposes and says that the foregoing statements have been compiled from the books and records of this company and from facts in the possession of its officers and employees, and after careful examination of the same, declares them to be a true, full and correct statement of the property of said company, and the value thereof as to all the matters herein set forth, to the best of my knowledge and belief.

(Signed) FORD HUNTINGTON, *Sec.*

Subscribed and sworn to before me this 31st day of January, 1900.

J. P. MILLER, *Notary Public.*

Diameter of pipe or tube.	Cast iron pipe.				Steel and wrought iron pipe.				Valves and boxes.				Street lamps.	
	Miles.	Age.	Miles laid since last tax assessment.	Kind of paving.	Miles.	Age.	Miles laid since last tax assessment.	Kind of paving.	Number.	Size.	Age.	Number set since last tax assessment.	Total number.	Number erected since last tax assessment.
4	15 2511	ft.												
6	137 3764		6571 ft.										3425	8
8	48 5008													
12	26 2493													
16	12 4259	Unable to give exact age; average 12 years.		Asphalt & granite, old, McAdam & city.		None			See attached memo.			These are but owned	lighted by the city.	by this Co.
20	8 1856													
24	4 2986													
30	621	ft.	624 ft.											
36	2 1144													

Total original cost of property described above laid complete, $ unable to state, acquired by consolidation. Total present value based on cost of reproduction, $ unable to state.

STATE OF NEW YORK, }
County of N. Y., } *ss.:*

Ford Huntington, secretary of the New Amsterdam Gas Co., being duly sworn, deposes and says that the foregoing statements have been compiled from the books and records of this company and from facts in the possession of its officers and employees, and after careful examination of the same, declares them to be a true, full and correct statement of the property of said company and the value thereof as to all the matters herein set forth, to the best of my knowledge and belief.

(Signed) FORD HUNTINGTON.

Subscribed and sworn to before me this 30th day of January, 1900.

J. P. MILLER, *Notary Public.*

1–4″.	10–6″.	11–8″.	12–12″.	7–16″.	10–20″.	6–24″.
Aug. '84	July '84	May '84	Oct. '84	June '86	Dec. '83	Nov. '83
	Nov. '83	Apr. '84	Oct. '83	Dec. '85	Dec. '83	July '86
	Aug. '86	June '86	May '84	Apr. '84	Sep. '83	Aug. '95
	Sep. '86	July '96	July '86	Oct. '83	May '86	Aug. '95
	June '95	July '96	Oct. '83	Apr. '86	Aug. '95	Aug. '95
	June '95	Oct. '93	Aug. '86	Apr. '86	July '94	Aug. '95
	June '95	Oct. '93	May '86	Aug. '95	July '94	
	June '95	July '93	Aug. '94		Aug. '94	
	June '95	Aug. '93	Apr. '94		Dec. '97	
	Oct. '99	Aug. '93	May '94		Dec. '95	
		Oct. '94	Aug. '95			
			(Oct. '99)			

To Mr. Alten S. Miller, chief engineer.

32 STATE OF NEW YORK:

State Board of Tax Commissioners.

ALBANY, *Jan.* 10, 1900.

Ford Huntington, secretary & treasurer New Amsterdam Gas Co., No. 340 Third avenue, New York city.

DEAR SIR: Referring to your letter of December 28th and to your report, we conclude that the New Amsterdam Company not only absorbs the East River Gas Company, but also the Equitable Gaslight Company, and conclude that the operations of these two companies are contained in your report.

We have not yet received the supplemental blanks sent you, which are necessary to determine the physical value of property located in public streets, etc.

Schedule "K" of your original report is defective, and we request that you furnish this board the information asked under that schedule at once, giving especially the value of the tangible real property included in special franchise on basis of cost of reproduction for the boroughs of Manhattan and Queens separately, and the value of the real property not included in special franchise on basis of cost of reproduction for each borough.

Yours very truly,

(Signed) PETER DEYO, *Secretary.*

33 EXHIBIT "C."

In the Matter of the Assessment of THE NEW AMSTERDAM GAS COMPANY under the Provisions of the Tax Law Relating to the Taxation of Public Franchises as Real Property.

To the Board of Tax Commissioners of the State of New York:

The New Amsterdam Gas Company respectfully complains of and protests against the valuation of $5,106,750 placed upon its public franchises in the borough of Manhattan, city of New York; and the valuation of $455,000 placed upon its franchises in the borough of Queens, in the city of New York, making a total of $5,561,750 by the State Board of Tax Commissioners, as illegal, improper and excessive; and in connection with this, its said protest and complaint, respectfully shows the following facts and arguments:

First. That the New Amsterdam Gas Company was organized as a corporation in November, 1897, by the consolidation of the Equitable Gas Light Company of New York, the New York and East River Gas Company, and the New Amsterdam Gas Company, pursuant to the laws of the State of New York in such case made and provided. These constituent companies, the said Equitable Gas Light Company, the New York and East River Gas Company and

the New Amsterdam Gas Company being separate corporations theretofore existing under the laws of the State of New York.

Second. That pursuant to the request of the said Board of Tax Commissioners this company on the 31st day of October, 1899, did make a certain report, and did later make a certain supplemental report to said State Board of Tax Commissioners, answering
34 fully and to the best of its ability the questions in said report contained, and it begs leave to refer to said reports in connection herewith.

Third. That the said New Amsterdam Gas Company on its organization pursuant to the statute in such case made and provided, paid to the State of New York as a condition of its incorporation and for the privilege of exercising its corporate franchises as stated in its articles of incorporation, a tax amounting to $28,750. That in addition to such tax it has yearly paid the following taxes to the State and city of New York:

(1.) To the city of New York a tax upon the assessed value of its real estate.

(2.) A tax upon its personal estate.

(3.) Certain special taxes for the privilege of laying its mains in the streets of said city; and a tax upon its gross receipts as hereinafter more fully set forth; and

(4.) To the State of New York an annual tax upon its gross earnings or receipts; all of which taxes have been paid pursuant to the laws of the State of New York and to special provisions under which it exercises its franchises.

Fourth. That the only right possessed by the New Amsterdam Gas Company to open the streets and lay its mains and pipes in the city of New York is based upon its possession through consolidation of the right theretofore possessed by the Equitable Gas Light Company of New York contained in a certain ordinance or resolution of the common council of the city of New York and set out in full in the report to your board dated the 31st day of October, 1899; and the special charter conferred by the State of New York to the East River Gas Company of Long Island City, pursuant to chapter 338 of the Laws of 1892, the stock of the said East River Gas Company of Long Island City having been entirely owned by the New York and East River Gas Company, which latter company was one of
35 the constituent companies of the New Amsterdam Gas Company.

That the ordinance giving the Equitable Gas Light Company the right to lay its mains, required as a condition of such right that it should pay to the city of New York twenty cents for each lineal foot of main laid by it in said city, and should further furnish to the city street lamps at a price not to exceed twelve dollars per annum per lamp.

That the special act giving to the East River Gas Company of Long Island City the right to lay its mains, to wit, chapter 338 of the Laws of 1892, required as to wit, chapter — of the Laws of ——, required as a condition of the exercise of such right, that such com-

pany should pay to the city of New York three per cent. upon the gross price received by it from the sale of gas passing through its mains in said city.

In pursuance to the ordinance heretofore referred to, the Equitable Gas Light Company and its successor, the New Amsterdam Gas Company, made the following payments to the city of New York for the privilege of laying its mains at the rate of twenty cents per lineal foot: from 1883 to 1898, inclusive, the sum of $164,436.71.

That from the year 1886 to the year 1899, the public lamps in said city supplied by the Equitable Gas Light Company and its successor, averaged four thousand lamps per annum at twelve dollars per lamp per annum, the price limited in its franchise, the city paid to the companies a total of but $672,000; whereas for similar lamps the Consolidated Gas Company, which was not restricted to a fixed price as a charge or tax upon its franchises or as a condition for the exercise of the same, received $17.50 a lamp per annum, or a total sum for the same number of lamps for the same period, of $980,000. In other words, the city of New York received during this period as a payment for the exercise of said franchise, in addition to the total of $164,436.71 paid for laying its mains,
36 $308,000 in the reduced price of lamps, making the total paid to the city of New York as a tax for the exercise of its franchises by the Equitable Gas Light Company and this company during said period of $472,000.

That the East River Gas Company of Long Island City, which is controlled by this company as hereinbefore set forth, from the date of its organization in the year 1894, to September 30, 1899, inclusive, has paid to the city of New York three per cent. on its gross receipts from the gas passing through its mains in the city of New York as a condition for the exercise of its franchise, which three per cent. has amounted to the sum of $76,177.15.

That these taxes upon franchises are peculiar to this company and its constituent companies and represent a burden in the form of taxation not shared by other gas companies or other corporations upon whom a special franchise tax is sought to be imposed by chapter 712 of the Laws of 1899. While, on the contrary, this company is not exempt from the general laws of taxation applicable to corporations of its character, and pay, as hereinbefore stated, to the State of New York a tax upon its gross receipts, and to the city of New York a tax upon its real and personal estate.

Fifth. That the commissioners and officials of the department of taxes and assessments in the city of New York, pursuant to the laws relating to taxation of property real and personal in said city, are charged with the duty of assessing the real estate of all corporations in the various boroughs of said city of New York at its actual value; and in the exercise of that duty said commissioners and officials did, for the year 1899, assess the real estate of the New Amsterdam Gas Company and its constituent companies, and did assess its mains and pipes and connections as real estate as follows:

Real estate, borough of Manhattan	$1,506,000 00
" " " " Queens	765,850 00
37	
Mains, pipes and connections, borough of Manhattan (East River mains, including tunnel)	1,120,00 00
Mains, pipes and connections, borough of Queens (East River Gas Co. of L. I. City)	170,000 00
Mains, pipes and connections, borough of Manhattan (Equitable mains)	602,000 00
Total	$4,163,850 00

That the total assessed value of the mains and tunnel of the New Amsterdam Gas Company and its constituent companies for the year 1899 was $1,892,000, and that this sum represents the full value of such property as real estate as found by said department of taxes and assessments.

That for the year 1900, said department of taxes and assessments has assessed said real estate as follows:

Real estate, borough of Manhattan	$1,556,000 00
" " " Queens	805,850 00
Mains, pipes and connections, borough of Manhattan (East River mains including tunnel)	315,000 00
Mains, pipes and connections, borough of Queens (East River Gas Co. of L. I. City)	9,000 00
Mains, pipes and connections, borough of Manhattan (Equitable mains)	50,000 00
Making a total of	$2,735,850 00

That these items of,

$315,000 00
9,000 00
50,000 00

making a total of $374,000 00, cover, as stated by the department of taxes and assessments, service and connections leading
38 from the mains of the company to the houses, and are treated by them as real estate, but as real estate, taxable by them and not by the State Board of Tax Commissioners under chapter 712 of the Laws of 1899. If these assessments be made by the department of taxes and assessments in the city of New York, and the valuations for the year 1889 be correct, then this assessment of $374,000 must be deducted from the total $1,892,000, the assessed valuation for the year 1899 of mains and pipes, exclusive of connections and service, and it leaves a balance of $1,518,000 as the valuation of the mains of this company as real estate in the city of New York.

That your honorable board of tax commissioners has found the total valuation of the mains and pipes and special franchises appertaining to the same, pursuant to chapter 712 of the Laws of 1899, of this company, to be the sum of $5,561,750. If from this sum there be deducted the sum of $1,518,000, which is the value of the mains and pipes of this company, irrespective of any franchise, there remains the sum of $4,043,750, which sum must represent the value your board fixes as the value of the franchise of this company, irrespective of the value of the real estate under chapter 712 of the Laws of 1899 as aforesaid.

Pursuant to chapter 712 of the Laws of 1899 (sec. 42) your board is required to *annually* fix and determine the valuation of each special franchise, and the act as a whole contemplates the possibility of the valuation of the franchise varying from year to year. In this connection, therefore, it is absolutely controlling to ascertain whether the exercise of the franchise by the company has proved profitable or not, and the extent of that profit, particularly during the year for which the tax is to be assessed.

That in the report called for by your board for data concerning the operations of the company from June 30, 1898 to June 30, 1899, in Schedule G, the receipts from actual operation amounted to $1,843,279.57, and that this sum represents the entire receipts
39 properly chargeable to operation. That this sum, plus the sum of $4,100.38, from interest and dividends, making a total of $1,847,379.95, represents the total receipts of this company and its constituent companies from its actual operation during the period called for in the report, to wit, from June 30, 1898, to June 30, 1899.

That the item under the heading "other sources," amounting to $386,204.80, was made up of $225,000 cash turned into the treasury of the New Amsterdam Gas Company as part of the assets of one of the constituent companies, and the balance representing work done for other corporations under which the profit, probably trifling, cannot be estimated.

The item under "sale of stocks and other bonds" amounting to $817,832.50 was not receipts from operation, but from the sale of bonds the proceeds of which were turned into the treasury and used for corporate purposes.

That the disbursements necessarily made on account of said operation, as set forth in Schedule G, were as follows:

Salaries	$34,851 22
Law expenses	12,908 62
General expenses	1,357,467 07
Taxes on capital stock and earnings	32,916 57
Taxes on property in this State	75,267 92
Making a total of	$1,513,411 40

as stated in the supplemental report to your board.

That if this sum of $1,513,411.40 be deducted from the total re-

ceipts from operation amounting to $1,847,379.95 there remains the sum of $333,968.55, which sum represents the money earned by this company during the period mentioned by the exercise of its franchises, over and above the actual cost of operation. If, therefore, the valuation as assessed by your board should stand, and
40 assuming that the tax rate would be the same as last year at $2.48, the tax on the franchise would amount to $100,285, or in other words about 30 % of the net receipts of the company for the operation of its franchise for that period. This calculation is made by deducting from the assessed valuation last year's assessment of real estate as such, leaving the value of the franchise $4,043,750, as hereinbefore stated, and computing the tax upon that at $2.48.

The above statement if made from June 30, 1898, to June 30, 1899, is not in the case of this company, however, a fair basis upon which to assess the value of the franchise, for the following reasons:

In or about the month of May, 1899, the New Amsterdam Gas Company as a result of competition with other companies, was compelled to reduce the price of gas from the legal rate of $1.10 per thousand cubic feet to $0.50 per thousand cubic feet, and has been selling gas to consumers in said city at approximately said rate since said date, so that but two months of receipts at this low rate are shown in the twelve months asked for. That the actual cost to this company of manufacturing and distributing gas largely exceeds $0.50 per thousand cubic feet, the approximate price at which it has been selling the same from the period mentioned.

That from May, 1899, to the present time this company has been operating at a loss and the exercise of its franchise during that period has been of no value. That, therefore, the New Amsterdam Gas Company respectfully request your board to place no value whatever upon the special franchises of this company apart from its real estate, which, it is submitted, should be assessed at the valuation heretofore placed upon it by the department of taxes and assessments in the city of New York, who have repeatedly examined and are familiar with its value, to wit, the sum of $1,518,000, and that the difference between that sum and the assessment of your board, to wit, the sum of $4,043,750, which represents the value of
41 the right to operate, should be entirely eliminated by your board, as there has been no value growing out of the operation, as hereinbefore fully explained.

Sixth. That the request for the reduction of the assessment as hereinbefore made is predicated upon the assumption that the tax sought to be imposed is valid and the act under which it is assessed constitutional. The New Amsterdam Gas Company respectfully reserves all right to contest the validity of the act under which the company is sought to be assessed, the equality of the method of taxation, or to raise any other legal objection to the imposition of the tax in its present or future form.

NEW AMSTERDAM GAS COMPANY,
By JAMES JOURDAN, *President.*

STATE OF NEW YORK,
City and County of New York, } ss:

James Jourdan, being duly sworn, deposes and says, that he is the president of the New Amsterdam Gas Company, and that as such president he executed the foregoing protest and complaint in the name of the company; and that the facts therein stated are true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief or in the form of argument, and as to those matters he believes it to be true.

JAMES JOURDAN.

Sworn to before me this — day of April, 1900.

— —.

42 *Order for Writ of Certiorari.*

At a special term of the supreme court held in and for the county of Albany, at the court house in the city of Albany, on the 13th day of July, 1900.

Present: Hon. Alden Chester, justice.

THE PEOPLE *ex Rel.* THE NEW AMSTERDAM GAS COMPANY
against
GEORGE PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS,
Constituting the State Board of Tax Commissioners.

On reading and filing the petition of the New Amsterdam Gas Company, verified July 10, 1900, and

On motion of John C. Tomlinson, attorney for said petitioner, it is

Ordered, that a writ of *certiorari* is issued as prayed for in said petition, directed to George Priest, J. Edgar Leaycraft and Lester F. Stearns, constituting the State board of tax commissioners of the State of New York, and that said writ be returnable at a special term of this court to be held in the city of Albany on the 31st day of July, 1900, at the opening of the court on said day or as soon thereafter as counsel can be heard; and that said respondents make their return thereto within said time at said special term and serve the same upon the attorney for the relator, and that said writ be allowed and signed and sealed by the clerk of this court.

Notice of this application is dispensed with.

Enter,

ALDEN CHESTER, *J. S. C.*

43 *Writ of Certiorari.*

The People of the State of New York to George Priest, J. Edgar Leaycraft, and Lester F. Sterns, constituting the State board of tax commissioners of the State of New York, Greeting:

Whereas, petition has been presented to us by the New Amsterdam Gas Company, duly verified, by which it appears that you as the State Board of Tax Commissioners did, notwithstanding the complaint and application for correction by the petitioner, illegally and erroneously assess and overvalue the special franchise constructed, maintained or operated by the petitioner in the borough of Queens, in the city of New York, at the sum of four hundred and thirty-seven thousand four hundred and thirty-three ($437,433) dollars, and the special franchise constructed, maintained or operated by your petitioner in the borough of Manhattan, in the city of New York, at the sum of three million nine hundred and eighty-nine thousand one hundred and eighty-two ($3,980,182) dollars, making a total of four million four hundred and twenty-six thousand six hundred and fifteen ($4,426,615) dollars; and

Whereas, no assessment whatever should be made upon the special franchises constructed, maintained or operated by your petitioner in the boroughs aforesaid; and

Whereas, you did cause a statement of such assessments or valuations to be filed with the department of taxes and assessments of the city of New York, to be entered in the assessment rolls for the boroughs of Queens and Manhattan for the year 1900; and it is alleged that such assessment is unequal with respect to the assessment of similar property and of other real estate on the tax rolls of the city of New York for the current year, and such assessment having been made at a higher proportionate valuation than like property on the same roll, and that the petitioner is or will be injured by such illegal, erroneous and unequal assessment,

44 and we being willing to review such assessment and all proceedings touching the same.

Now, therefore, we do command you that you certify unto our supreme court at a special term thereof to be held in and for the county of Albany, in the city of Albany, on July 31st, 1900, at the opening of the court on that day, all your proceedings, decisions and acts in the premises with the reasons therefor and dates thereof, and all and singular the said assessments, documents, records and papers touching or concerning the valuation or assessment of the special franchises constructed, maintained or operated by the New Amsterdam Gas Company in the borough of Queens and in the borough of Manhattan for the purpose of taxation for the year 1900, and that you also serve a copy of such return on the attorney for the petitioner on or before such date; to the end that your proceedings, decisions and acts in the matter of said assessments and valuations

may be reviewed and corrected on the merits by our said court and that we may further cause to be done thereupon what of right shall be fit to be done.

Allowed July 13, 1900.

ALDEN CHESTER, *J. S. C.*

Witness, Hon. Alden Chester, justice of the supreme court, in the city of Albany, on the 13th day of July, 1900.

By order of the court:

P. E. McCABE, *Clerk.*

JOHN C. TOMLINSON,
Attorney for Petitioner, 15 Wall Street, New York.

45 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW AMSTERDAM GAS COMPANY
against
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Constituting the State Board of Tax Commissioners.

To the supreme court of the State of New York:

George E. Priest, Lester F. Stearns and J. Edgar Leaycraft, constituting the State board of tax commissioners, respectfully return to the writ of certiorari issued out of this court on the 13th day of July, 1900, as follows:

I.

This return, except in so far as it is otherwise stated, or where the matters herein returned are matters of record, is made upon information and belief.

II.

All of the proceedings required by statute for the purpose of making and certifying the valuation aforesaid were had before said board, and done and performed in compliance with the statute in such case made and provided, namely, the provisions of chapter 712 of the Laws of 1899, and the amendment thereto.

III.

46 The State Board of Tax Commissioners was and is authorized by law to make the valuation and assessment complained of, and in the manner and form as made by it, and the statute under which the said valuations were made is in accordance with the Constitution and valid and binding upon the relator, and all of the acts done and performed by the said State Board of Tax Commissioners as set forth in the petition herein were in accordance with law and valid under the constitution and laws of the State of New York and of the United States.

IV.

The matters and proceedings set out in the schedules numbered "A" to "C" inclusive annexed to the petition hereto, are correctly and properly set forth and said schedules together with the proceedings had and statements made before said board on the hearing on the 10th day of April, 1900, and annexed hereto and marked Schedule "D" and together with the list of mains filed with the said State Board of Tax Commissioners with said report, which are hereby made a part of this return as if set out at length, contain all and singular the documents, records, papers, written statements, affidavits and objections served upon or filed with the said State Board of Tax Commissioners in relation to the assessment of its special franchises in the respective boroughs of Queens and Manhattan in the city of New York, in which such franchise is situated and the valuations made by them and all the hearings had before such board held pursuant to law. Together with all the stenographer's notes of opinions, orders and conclusions of said board or of the principles involved in making the same, so far as the same are of record.

V.

At a regular meeting of the State Board of Tax Commissioners held at its offices, at the capitol, in the city of Albany, N. Y., on the 27th day of April, 1900, the said State Board of Tax Commissioners duly fixed and determined the valuation of the special franchise of the relator, subject to assessment in said boroughs of
47 Queens and Manhattan, in the city of New York, at the sum of $4,426,615.

VI.

That the petitioner is in no wise aggrieved by the action of the State Board of Tax Commissioners in the premises and that the sum fixed by it as the valuation of the special franchises of the relator in the said boroughs of Queens and Manhattan, in the city of New York, in which such franchise is situated, is neither erroneous nor illegal, nor is the same an over-valuation of such special franchises in said boroughs of Queens and Manhattan.

VII.

That at and previous to the time when the assessment and valuation of such special franchises was made by your respondents, The State Board of Tax Commissioners, it had made inquiry, examination and investigation as to the value of the special franchises of the relator in said boroughs of Queens and Manhattan in which such franchises are situated; and from such inquiry, examination and investigation, together with the papers and documents produced before it, it decided the value of the special franchises of the relator to be the full sum of $4,426,615 and it fixed the value of such

special franchises for the purpose of assessment at the said sum of $4,426,615, which your respondents believe to be its just and true value, and which they decided to be the sum at which the special franchises of the relator in the said boroughs of Queens and Manhattan *was* properly assessable for the year 1900, after hearing the relator and after consideration of the matters presented by it as grounds for reduction.

VIII.

48 That your respondents have not sufficient knowledge or information to form a belief as to the percentage of assessment by the local authorities of said boroughs of Queens and Manhattan of other property in said boroughs of Queens and Manhattan for the year 1900, but return as a fact, that the special franchises hereinbefore referred to are assessed at the sums which a majority of this board have decided to be the full value thereof.

IX.

That at the time the assessment complained of herein was made and at the present time the relator herein was and is the owner and operator of a franchise, right, authority and permission specified and defined in subdivision 3, section 2 of the tax law as a special franchise and at all of the times aforesaid it was and is subject to taxation on the same.

In witness whereof, the undersigned, chairman of the State Board of Tax Commissioners, has hereunto set his hand this 11th day of January, 1901.

GEO. E. PRIEST, *Chairman.*

STATE OF NEW YORK, }
City and County of Albany, } ss.:

George E. Priest, chairman of the State Board of Tax Commissioners, being duly sworn, deposes and says: That he has read the foregoing return and knows the contents thereof; that the same is true to the knowledge of deponent except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

GEO. E. PRIEST.

Subscribed and sworn to before me this 11th day of January, 1901.

MILLICENT FELLOWS,
Notary Public, Albany Co.

49 SCHEDULE D.

Afternoon Session.

Chairman PRIEST: Is the Brooklyn Wharf and Warehouse Company represented?

No answer.

Commissioner PRIEST: The New Amsterdam Gas Company.

John C. Tomlinson, of 15 Wall street, New York city, appeared for the company and addressed the commission as follows:

May it please the board:

I not only represent before the commission this New Amsterdam, but also the Northern Union and Central Union Gas Companies, which are a part of the New Amsterdam system.

Now, I, of course, proceed on the theory that this commission are wrong in construing this act and in reaching the theory upon which they base their estimates. I shall not devote any time in pressing upon the commission any particular view or theory of the law. I take it that you gentlemen have reached some conclusion in your own mind as the theory upon which you proceed and that the disposition of questions which come before you, must necessarily bow under compulsion to the system you have adopted.

Now, gentlemen, I shall only hope to present to your board, such consideration as should cause a discrimination to be made by you in favor of the New Amsterdam Gas Company in contrast with many other gas companies, assuming you proceed upon the same theory in fixing the values of the property for certain special reasons.

The New Amsterdam Gas Company is a consolidation of
50 the Equitable, the East River and the New Amsterdam Companies, which companies existed in New York, paying the ordinary tax upon its organization, upon its real estate and upon its personal property, and now pays a certain tax for the privilege of laying its mains in the streets of the city and has paid them for a number of years. Under the Equitable charter we are compelled to pay 20 cents per lineal foot for every foot of pipe laid in the streets, and we have already paid in that behalf to the city $164,000. We are also compelled to furnish lamps to the city at $12 per year, whereas other companies charge $17.50. From 1883 to 1898 we have paid $308,000 in that behalf to the city.

The East River, one of the constituent companies, by special act of the legislature incorporating it, is compelled to pay 3 per cent. upon its gross receipts for gas passing through the streets. We have paid $76,000. So up to the present time we have paid to the city of New York large receipts.

Commissioner STEARNS (interrogating): You mean the same rate that would prevail if you sold the gas?

Mr. TOMLINSON: The 3 per cent. is on the price paid us for the cost

of the gas. We have paid $508,000 since 1883, $508,000 over and above all form of tax.

Commissioner STEARNS: Perhaps I don't understand, when you say you paid, you mean to say you furnished gas at $12 a lamp?

Mr. TOMLINSON: Yes, sir.

Commissioner STEARNS: As a regular price?

Mr. TOMLINSON: They have not paid, but the city has got the benefit of that. You are quite right in saying that I spoke colloquially; if they had paid we would have collected $308,000 more.

Commissioner STEARNS: Perhaps you would not have furnished it?

51 Mr. TOMLINSON: Yes, would have been very glad to have furnished it. We have paid a special tax as a burden for the exercise of our privileges peculiar to us, as I say, of $508,000, and I submit that fact should be taken into consideration in estimating the value of our franchise. I merely first present the proposition that having paid $508,000 that this should be given consideration. And in addition to that, as I understand it, you are assessing this tax annually, and, therefore, you are assessing the annual value of the franchises. The theory seems to be, that one year you might find it worth five hundred millions and next year ten, and the next year three, according as circumstances developed. Now it does not assess for the past two years. The New Amsterdam Gas Company has been exercising these franchises at a loss for the period of time for which the estimate was made. By the report of June, the net earnings of the company, by which I do not include the interest on bonds, but the actual earnings of the company, the receipts of the company over and above its expenditures for gas, were about three hundred and thirty-three thousand dollars, leaving a deficit of some five hundred thousand dollars of our fixed charges.

Commissioner STEARNS: What are your bonds?

Mr. TOMLINSON: The whole issue of bonds?

Commissioner STEARNS: Yes.

Mr. TOMLINSON: About eighteen millions nine hundred thousand dollars are our fixed charges.

Commissioner STEARNS: What is the lowest rate of interest paid on them?

Mr. TOMLINSON: Five per cent., and not including the interest on bonds for that year, our receipts over the other expenses were $333,000. This is all set out on paper, and I don't want to burden you with any extended discussion, but during that time we were confronted with a gas war in the city of New York, and we have been selling gas at fifty cents per thousand cubic feet, which is a little less than it costs us to make and distribute the gas. We

52 cannot make and distribute gas for the price at which we have been selling it in competition with other companies. We not only have not earned our fixed charges but we have been selling gas for less than it cost us to make it. I think that is something that should entitle us to receive consideration, the fact of

treating the public fairly; in fact, we have been supplying the public with gas——

Commissioner STEARNS: Did you do that through motives of philanthropy?

Mr. TOMLINSON: We did it from motives of necessity we found; we didn't wish to do it.

Commissioner PRIEST: Did the quality of the gas deteriorate in consequence of that lowering of price?

Mr. TOMLINSON: Not a bit, sir; we kept the candle power up to the quality of light. We haven't furnished for the year any gas of less than six candle; the gas was good gas; I don't include in that any interest on the investment, but the mere question of coal and oil and labor to make the gas. Our exercise of our franchise for the past year has been entirely for the benefit of the public, and in no way for the benefit of ourselves. We have really been public benefactors, and I submit we should not be taxed for being public benefactors.

According to the figures estimated here—if you will deduct from the value, the value of the mains, the franchise assessed as the value of the mains by the city officers for the last year—you will find that franchise has been $4,500,000 and the tax is about one hundred thousand dollars. If your tax rate should prevail, if you should preserve the estimate you would make us pay this $100,000 for the exercise of the franchise at an absolute loss. Now I think that we are a company entitled to peculiar consideration at your hands for that reason.

Commissioner STEARNS: Was this loss voluntary or involuntary?

53 Mr. TOMLINSON: It was voluntary in the sense we voluntarily reduced our price. It was involuntarily in the sense that we were compelled, voluntarily or not, to reduce it in competition to save ourselves.

Commissioner STEARNS: Haven't you increased it?

Mr. TOMLINSON: We increased the rate for one month, sir, prior to the first or January. We were afraid the legislature would come in and reduce the price of gas to the price at which we had been charging, which would mean absolute ruin. So the company, therefore, restored the price of gas to the legal rate in the hope our competitors would follow suit. Finding that they did not and we were losing all our customers—we lost ten to twenty thousand consumers, I think, that month—we went back to the former price.

Comissioner PRIEST: Will you tell the cost of your tangible property in the streets in round numbers.

Mr. TOMLINSON: I am not able to do that for the reason we are a consolidation of older corporations and the books of these older corporations did not show that. We could say the actual cost of laying the mains has been what the consolidation paid for the property in stocks and bonds, but we are unable to state what the actual cost of the mains has been. We are in the same position as many other corporations who are the result of consolidations. We would be very glad to state it if we could.

Commissioner PRIEST: What do you estimate to be the value of your tangible property in the streets, based on the cost of reproduction to-day?

Mr. TOMLINSON: For that same reason we are unable to answer that question. It would be very easy to calculate if we could know the character of the soil through which each main went. If I am called upon to lay a main in a country road, that is one proposition. If I am called upon to lay a main in a road where there is a great deal of rock, that is another proposition. If I am called upon to lay
54 a main in a street that is largely occupied with gas-pipes, if I have to circle around—for instance I know mains that cost $500,000 to lay one mile in the city of New York and I suppose you could lay the same in a country road for $25,000.

Commissioner STEARNS: What is the value of your real estate outside the streets?

Mr. TOMLINSON: That is stated in our report, I think. About one million eight hundred thousand dollars.

Commissioner STEARNS: Bonds are how many million.

Mr. TOMLINSON: About eighteen million.

Commissioner STEARNS: Your stock is how much?

Mr. TOMLINSON: About twenty.

Commissioner STEARNS: What is the lowest dividend paid on your stock?

Mr. TOMLINSON: Never have paid anything.

Commissioner STEARNS: The lowest rate of interest on your bonds?

Mr. TOMLINSON: Five. We have earned last year—we have not earned anything, not one penny, on the bonds; we are five hundred thousand dollars short.

Commissioner STEARNS: In proportion to the cost of your capital stock—I don't mean share stock of course—the proportion would be very wide, between the cost of your property and the amount of your bonded indebtedness, would not it?

Mr. TOMLINSON: It might be; it would.

Commissioner STEARNS (int'g): To be frank about it, a good deal of water in it?

Mr. TOMLINSON: Yes; I helped to put it in; I am familiar with one part.

55 Commissioner STEARNS (laughing): Did you get your bucket full?

Mr. TOMLINSON: I got it as full as I could; there were some other big buckets; my bucket was a very small one; you might call mine a tin cup; now to be frank with you; of course I wouldn't care to say it for publication—there is more or less water, the same as there is in all of these reorganizations. But I must present to your board this direct proposition: We have exercised the franchise we have got from the city; exercised that at an absolute loss, and therefore should not be taxed. Next year, if we should make a better showing, that would be a different proposition.

Commissioner STEARNS: How long has this war been on?

Mr. TOMLINSON: A little over a year.

Commissioner STEARNS: Did pretty well before that?

Mr. TOMLINSON: No; before that we were a new company, in active competition, endeavoring to get customers from the other companies. That is practically the situation, and we were at a very great expense for canvassers, etc., and trying to get our business. We hope ultimately it will prove profitable.

Commissioner STEARNS: There has been some suggestion made, you know, that your company was about to be taken into the Consolidated.

Mr. TOMLINSON: As to that I know nothing. While I am a director in the New Amsterdam Company, and one of the counsel, and familiar with its affairs, generally so, I must say I know nothing of anything of the kind.

Commissioner STEARNS: We know nothing about it, you know.

Mr. TOMLINSON: It has been a matter of general conversa-
56 tion. I assume the time will come when these companies, from selfish interests of their own, will come to some understanding, but I know of nothing now that will result in that.

I have prepared a statement setting forth these facts and I trust I have made my position clear. I don't want to argue any constitutional law, as I understand you have decided as to that.

Commissioner STEARNS: We have all held it is constitutional.

Mr. TOMLINSON: I should not urge this board to declare themselves out of office. I will file this in behalf of the New Amsterdam Company.

When you come to the Northern Union and Central Union, which are small constituent companies, there they will show some earnings, because in the upper part of the city the price of gas has not been reduced, so we have made a calculation of a different kind—I will be perfectly frank—there; we have endeavored to show that the assessment should be very greatly reduced by a computation of the square feet of ground we occupy, what they are worth, or what we could have bought our right of way for.

Commissioner STEARNS: I have heard that from a good many. Of whom would you buy it?

Mr. TOMLINSON: We could have bought it in the rear of lots. We made up an estimate that we occupied a certain number of feet——

Commissioner STEARNS (interrogating): You would have to institute proceedings?

Mr. TOMLINSON: We would have had no right of condemnation; made private purchases.

Commissioner LEAYCRAFT: Do you know you could have done that as a matter of fact?

Mr. TOMLINSON: We could in the annexed district, I haven't
57 the least doubt. I will be perfectly frank and candid. I think we would find some difficulty when we attempted to cross the streets. I think the fallacy of my argument is in that regard.

Commissioner STEARNS: I supposed the condemnation law provided or allowed this thing.

Mr. TOMLINSON: Then we could have condemned.

Commissioner STEARNS: It would have cost you in damages a great deal of money for that purpose.

Mr. TOMLINSON: There would have been practically no damages. We don't disturb the surface of the street. A two-inch pipe sunk eight or ten feet would never interfere in any way, or very slightly.

Commissioner STEARNS: When you come to condemning sometimes, a little thing becomes big.

Mr. TOMLINSON: Oh, I know, a man might demand $5,000,000 or $10,000,000 when he could give you trouble. We made a computation for these two companies in that form. We thought that was the best we could possibly do in that particular case.

Commissioner STEARNS (laughing): You are all right.

Mr. TOMLINSON: You are too expert and intelligent for me to seek to be anything other than candid.

In the case of the Northern and Central Union Companies they have no franchises, our franchise has expired.

Commissioner STEARNS: You're in the street?

Mr. TOMLINSON: We are in the street.

Commissioner STEARNS: We will very likely find you have got one if you are in the street at all.

Mr. TOMLINSON: Of course I shall argue that before some other tribunal. The company had a lease there for thirty years, and the thirty years have expired. That act was for maintenance, construction and operation. I don't know whether you gentlemen
58 regard as a part of the franchise tax, our right to be a corporation. It seems to me, under the act, you do tax that. I know I am at more or less difference with my brethren in this regard. The only valuable thing we do possess is not mentioned, that is the right of occupancy. It is the right of occupancy that gives us a value in these streets, because anybody has a right to construct and maintain as an individual or as a corporation. You derive that from your original certificate of incorporation, the right to operate. If you gentlemen are to hold that a franchise means a right of occupancy, why, we have no right of occupancy under that act. If, however, you say you include the right to operate as a corporation, then, of course, you can tax us.

Commissioner STEARNS: See what an advantage it will be for us to find the two franchises there, why, then the councilmen will have nothing tenable at all to maintain their action.

Mr. TOMLINSON: I see you are going on the theory as a gentleman said before, you are going to tax anything wherever you see, whenever you see and as often as you see. You must preserve a system for the justification of your existance. You have got to adopt some system and have it more or less unbroken. Now, assuming this is correct, assuming that you did adopt a theory—I don't seek to ascertain what it is. I simply say if you find the franchise of our company valuable upon your theory, if you find any of these companies

valuable as it seems to you, I suppose you will tax them, but I think you must find ours valueless, due to the fact that we have exercised it at a loss. I will file these papers without going into them.

Commissioner PRIEST: I have no doubt they will receive careful consideration from each member of the commission.

Mr. TOMLINSON: I will submit a statement for the New Amsterdam Company, for the Central Union and for the Northern Union.

I am very much obliged to you gentlemen.

59 *Order of Reference.*

At a special term of the supreme court of the State of New York, held in and for the county of Albany, at the court-house in the city of Albany, on the 18th day of April, 1901.

Hon. D. Cady Herrick, justice.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERDAM Gas Company
against
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Composing and Constituting the State Board of Tax Commissioners of the State of New York.

A writ of certiorari having heretofore been duly allowed in the above-entitled proceeding, pursuant to the provisions of article XI. of the tax law, as amended by chapter 712 of the Laws of 1899, upon the verified petition of the above-named relator, to review the action of the State Board of Tax Commissioners in assessing the special franchise of the said relator; proof of due service on the said commissioners of the said writ, together with copies of the petition on which it was granted and of the order directing the said writ to issue having been made; the said Board of Tax Commissioners having made a return to said writ; further proceedings herein having been from time to time adjourned by stipulation between the attorneys for the respective parties; no hearing having been had upon the said return; the said relator, by its
60 attorney, John C. Tomlinson, Esq., having made application to this court for an order appointing a referee to take such evidence herein as the court may direct and to report the same to this court, with his findings of fact and conclusions of law; the attorney general of the State of New York, on behalf of the said State Board of Tax Commissioners, having appeared and consented to such reference and to the granting and entry of an order of reference;

Now, on the said petition, order, writ and return, and all the proceedings heretofore had herein, and on motion of the said attorneys for the relator, the attorney general appearing and making no objection thereto, it is

Ordered that it be and it hereby is referred to Robert Earl, Esq., residing at Herkimer, in the State of New York, to take and report

to this court, with all convenient speed, such evidence upon the several issues raised by the said petition, writ and return as may be adduced before him by either of the parties hereto, with his findings of fact and conclusions of law thereon; and it is further

Ordered that the hearings under this order be had at such times and places as the said referee may direct; that the said referee shall have power to adjourn such hearings from time to time as justice may require and to compel the attendance of witnesses and the production of papers.

D. CADY HERRICK,
Justice Supreme Court.

I consent to entry of foregoing order.
April 18, 1901.

JOHN C. DAVIES,
Attorney General, Attorney for Respondents.
JOHN C. TOMLINSON,
Attorney for Relator.

61 *Testimony.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERDAM GAS COMPANY
against
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Constituting the State Board of Tax Commissioners of the State of New York.

Appearances—For the plaintiff, John C. Tomlinson and David B. Hill; for the defendant, Deputy Attorney General H. B. Coman and J. N. Fiero.

Proceedings in the above entitled matter were had in the assembly parlor, new capitol, in the city of Albany, N. Y., on Tuesday, July 16, 1901, before Hon. Robert Earl, referee, as follows:

It is stipulated that the referee's oath be, and hereby is, waived.

It is stipulated that all the evidence given in the Metropolitan Street Railway Company case relating to the ratio of assessed to actual value in the city of New York, and also all the testimony relating to the manner in which the valuations and assessments generally were made in the cases before the referee are to be deemed a part of the evidence in this case, subject to the same objections as made to the evidence when given and same rulings and exceptions.

It is stipulated that the report of the relator to the State
62 Board of Tax Commissioners for the year ending September 30, 1899, verified October 31, 1899, and the supplemental reports, verified December 20, 1899, and April 17, 1900, are now regarded as before the referee, as exhibits in the case, and as evidence

of what was before the board in making its valuation of the special franchises of the relator company. That said reports may be annexed to the testimony herein, as exhibits and that the copies of the special laws and maps, which constitute a part of said report, may be referred to by either party at any stage of the case, said special laws being in evidence and forming separate exhibits in the case.

(NOTE.—The following four stipulations are taken from the record in the Metropolitan Street Railway Company's case, and are a part of the record in this case, according to stipulation.)

It is stipulated that the copies of the franchises of the various relator companies annexed to their reports filed with the State Board of Tax Commissioners are correct copies of the original papers and are received in evidence as and in lieu of the originals thereof.

It is stipulated that the several relator companies in the several proceedings now pending before the referee, on or before April 16, 1900, orally and in writing, requested and demanded of the said board to know the amount at which their respective tangible properties had been valued included in the several special franchise assessments, and also that they be informed of the rule or principle adopted by the board in making their valuations and assessments upon the special franchises of the said several companies. These demands or requests were not granted, and such information was not given the relator companies by said board of assessors.

It is stipulated that any relator company in any certiorari proceeding now pending before the referee may read in evidence
63 from the testimony and proceedings in any other of the proceedings now pending before the referee subject to the objection and exception taken to the same.

It is stipulated that the report and supplemental reports made by the relators to the State Board of Tax Commissioners, and heretofore offered in evidence, were made by direction of said board under section 43 and other provisions of chapter 712 of the Laws of 1899, and upon forms provided by said board and transmitted by it to the relator corporations to be filled out and returned to it. Form of this report and of these supplemental reports is offered in evidence.

ALBANY, N. Y., *July* 25, 1901.

Mr. TOMLINSON: I offer to prove that the amount paid by the Equitable Gas Light Company, one of the constituent companies of the New Amsterdam Gas Company, under its ordinance from the city giving it the right to open the streets for the laying of mains, by which ordinance it was required to pay twenty cents per lineal foot for every foot of main laid from the year 1883 to 1898, inclusive, amounted to the sum of $164,436.71.

Objected to as immaterial and irrelevant, on the ground it does not make any difference to this issue as to what amount had been paid the city during the fifteen or sixteen years before this franchise tax went into existence.

The REFEREE: Are these annual compensation to the city?

Mr. TOMLINSON: No; twenty cents per lineal foot as they laid the main.

Objection overruled; exception.

Mr. TOMLINSON: I offer to prove that another of the conditions imposed upon the Equitable Gas Light Company in the ordi-
64 nance permitting it to lay its mains, was that it should furnish public lamps to the city of New York at $12 per annum per lamp. That from the year 1886 to the year 1889 the public lamps in the city of New York supplied by the Equitable Gas Light Company averaged 4,000 lamps per annum, at $12 per lamp, the price limited in the ordinance, and that the city paid to that company for lamps so furnished during the period mentioned a total of $672,000; whereas, for similar lamps furnished by other companies furnishing light in the city of New York, not restricted to a fixed price, such other companies were paid $17.50 a lamp per annum, a total sum for the number of lamps mentioned of $980,000.

Objected to as immaterial, irrelevant, and it is a matter of no importance to this litigation what amount the city had received during a period of thirteen years previous, nor is it competent what was paid by the city for lamps from other companies; it doesn't appear the conditions were the same, or any fact which would warrant the receiving of the evidence; objection overruled; exception.

Mr. TOMLINSON: I offer to show that the tax of three per cent. on its gross receipts from gas passing through its mains in the city of New York, which the East River Gas Company of Long Island City is required to pay, under the special act of the legislature giving it the right to lay its mains in the city of New York, from the date of its organization in the year 1894 to September 30, 1899, inclusive, has amounted to $76,177.15, which amount the company mentioned has paid, as required by this act, to the financial officers of the city of New York.

Objected to as immaterial, the fact that during five years a percentage which was paid amounted to a certain sum is irrelevant; it is not competent for the reason that everything in the nature of a tax which is paid by the company is the subject of a rebate under the provisions of the franchise tax law.

65 The REFEREE: How do you claim that what they paid in the past is a present burden is to be taken into account?

Mr. TOMLINSON: It is a continuing burden; it is a burden that must be paid every year, and I don't know how far the fact that this tax is to be assessed annually——

The REFEREE (interrupting): I suppose in this aspect it may be competent to show about what this burden amounts to.

Mr. TOMLINSON: That is my sole purpose.

Objection overruled; exception.

It is considered that the above are to be taken as facts the same as if the witness was on the stand and swore to it.

ALBANY, N. Y., FRIDAY, *October*, 18, 1901.

The following questions were asked of the officers of the New Amsterdam Gas Company, and the following answers given, and the same are offered in evidence by the attorney-general:

Counsel for the companies object to each and every question on the ground the same is irrelevant and improper and does not constitute a proper basis for estimating the value of the special franchise.

Objection overruled; exception.

Q. What was the value of the common and preferred stock and of the bonds of this company on the second Monday of January, 1900?

A. It is conceded, for the purpose of this proceeding only, that the market value of the common stock at the period mentioned was between 26 and 30. The market value of the preferred stock was between 56 and 60. The market value of the bonds was about 95.

Q. In your letter dated January 30, 1900, you state the East River Gas Company has no corporate existence. In Schedule L you
66 state that the New Amsterdam Gas Company owns $1,000,000 of the stock in the East River Gas Company of Long Island City. Kindly state fact with reference to this matter?

A. In the letter referred to it was stated, not that the East River Gas Company of Long Island City had no corporate existence, but that the New York and East River Gas Company had no corporate existence. The fact, briefly, is this: The New York and East River Gas Company was merged into the New Amsterdam Gas Company by consolidation. The East River Gas Company of Long Island City continued in existence as a corporation. Its stock is $1,000,000 and is all owned by the New Amsterdam Gas Company.

Q. What was the value of the stock of the New York Carbide and Acetylene Company on the second Monday of January, 1900?

A. This stock had no market value whatsoever. It has never been dealt in in any way. The company owns a patented process, the value of which has yet to be determined.

Q. What was the value of the Central Union Gas Company's stock, same date; also value of the Northern Union Gas Company?

A. It is impossible to state the value of the stock of these companies; neither has paid any dividends, nor were there any sales or dealings in the stocks mentioned. Both stocks are held in the treasury of a parent company.

Q. Has this company any source of income except its real and personal property, aside from the stock in question; and what is the income, if any, from the stock in these companies held by it?

A. This company derives no income from the stocks mentioned, nor has it any source of income except from its real and personal property.

Q. What was the total amount of tax paid by this corporation for the year ending June 30, 1899? Please itemize.

67 A. Tax on gross earnings, $11,333.28; tax on gross receipts, $21,583.29; tax on property in this State, $75,267.92; total, $108,184.49.

Q. How do you arrive at statement of disbursements of earnings for year ending June 30, 1899, total amount paid for taxes, percentage, license fees, etc., $150,000?

A. On the first of January of each year the taxes for the ensuing year are estimated and certain proportion charged on the books each month. On this basis the taxes for the year 1899 were based on an annual tax of $150,000, made up of real estate, personal, State and city taxes; the amount charged out each month being $12,500.

Statement of disbursements of earnings for the year ending June 30, 1899, were made up as follows:

Tax on property in State	$75,267 92
Salaries of general officers and clerks	34,851 22
Law expenses	12,908 62
Other general expenses (manufacturing and distribution)	1,357,467 07
Tax on capital stock and earnings	32,916 57
Tax on property in State	$1,513,411 40

From Consolidated Gas Company's record, page 67.

Plaintiff's counsel offered in evidence the certificate of organization of the New York Gas Light Company.

Marked "Pl'ff's Ex. No. 1, Sept. 4, 1901—J. M. R."

Plaintiff's counsel offered in evidence the certificate of organization of the Manhattan Gas Light Company.

Marked "Pl'ff's Ex. No. 2, Sept. 4, 1901—J. M. R."

Plaintiff's counsel offered in evidence the certificate of organization of the Municipal Oxygen Gas Company of the City of New York.

Marked "Pl'ff's Ex. No. 3, Sept. 4, 1901—J. M. R."

68 It is stipulated that the name of the Municipal Oxygen Gas Company, whose certificate of organization has just been put in evidence, was afterward changed to the Municipal Gas Light Company of New York.

Plaintiff's counsel offered in evidence the certificate of incorporation of the Knickerbocker Gas Light Company.

Marked "Pl'ff's Ex. No. 4, Sept. 4, 1901—J. M. R."

Plaintiff's counsel offered in evidence the certificate of incorporation of the Harlem Gas Light Company.

Marked "Pl'ff's Ex. No. 5, Sept. 4, 1901—J. M. R."

Plaintiff's counsel offered in evidence the articles of consolidation of the Consolidated Gas Company.

Marked "Pl'ff's Ex. No. 6, Sept. 4, 1901—J. M. R."

Plaintiff's counsel offered in evidence the certificate of incorporation of the Equitable Gas Light Company of New York.

Marked "Pl'ff's Ex. No. 7, Sept. 4, 1901—J. M. R."

Plaintiff's counsel offered in evidence the certificate of incorporation of the New York and East River Gas Company.

Marked "Pl'ff's Ex. No. 8, Sept. 4, 1901—J. M. R."

Plaintiff's counsel offered in evidence the certificate of incorporation of the New Amsterdam Gas Company.

Marked "Pl'ff's Ex. No. 9, Sept. 4, 1901—J. M. R."

Plaintiff's counsel offered in evidence the consolidation agreement of the Equitable Gas Light Company of New York and the New York and East River Gas Company.

Marked "Pl'ff's Ex. No. 10, Sept. 4, 1901—J. M. R."

69 Plaintiff's counsel offered in evidence the articles of incorporation of the Standard Gas Light Company of the City of New York.

Marked "Pl'ff's Ex. No. 11, Sept. 4, 1901—J. M. R."

By consent of counsel copies of the papers were introduced and marked instead of the originals, subject to correction.

Plaintiff's counsel offered in evidence chapter 248 of the Laws of 1886, which was an act granting certain franchises to the Standard Gas Light Company of New York.

Plaintiff's counsel offered in evidence chapter 338 of the Laws of 1892, passed April 19, 1892, entitled "An act to authorize the East River Gas Company of Long Island City to supply gas and electricity in the city of New York."

Plaintiff's counsel offered in evidence the certificate of incorporation of the East River Gas Company of Long Island City.

Marked "Pl'ff's Ex. No. 12, Sept. 4, 1901—J. M. R."

Plaintiff's counsel offered in evidence the following special laws, constituting the charter of the New York Mutual Gas Light Company: Chapter 651 of the Laws of 1866; chapter 154 of the Laws of 1868, chapter 755 of the Laws of 1869.

Plaintiff's counsel offered in evidence the notice of final assessment, dated April 28, 1900, by the State Board of Tax Commissioners, of the Consolidated Gas Company.

Same was offered in evidence and marked "Pl'ff's Ex. No. 13, Sept. 4, 1901—J. M. R."

Plaintiff's counsel offered in evidence the assessment for the year 1899, by the State Board of Tax Commissioners, of the special franchises of the New York Mutual Gas Light Company. The assessment was $2,326,174.

70 Plaintiff's counsel offered in evidence similar assessment of the special franchises of the Standard Gas Light Company of the City of New York; for Bronx, $118,550; for Manhattan, $3,009,240.

Plaintiff's counsel offered in evidence similar assessment of the special franchises of the New Amsterdam Gas Company; this company was composed of the New York and East River Gas Company and the Equitable Gas Company; the two component companies were assessed separately, the New York and East River Gas Company at $137,433, and the Equitable Gas Company at $3,989,182.

Defendant's counsel objected to the evidence as to assessments as immaterial and irrelevant; objection overruled; exception.

(NOTE.—The following testimony of Mr. Priest was taken for all cases, including this case, on July 2, 1901, and recorded in the Metropolitan Street Railway Company case, and is a part of the record in this case, according to stipulation.)

GEORGE E. PRIEST, sworn for all the plaintiffs, and testified:

Examined by Mr. PAGE:

Q. How long have you been a State tax commissioner?
A. I was appointed on the 14th day of April, 1899.
Q. Have you participated, as president and as a member of the State Board of Tax Commissioners, in making the assessments of the various relator companies for the year 1900?
A. I did; all of them.
Q. In making the assessments against the several companies, do your assessments as made include an assessment for the value of the intangible franchise and an assessment for the value of the
71 tangible property connected therewith?

Objected to upon the ground that the assessment speaks for itself. The law directs what the commissioners are to do and their official act speaks for itself. On the further ground that the commissioners cannot be examined upon that question as to what they actually did and cannot be called in reference to that.

The REFEREE: Have you any authority for that?
Mr. FIERO: Yes, sir; I think I have abundant authority.
The REFEREE: We are bound to assume they have included everything the law requires in making their assessment, but if you insist upon the question you can put it.

A. The values which we found were the values of the tangible property in the streets, together with the right to have and use the real property.

By the REFEREE:

Q. You assessed the value of both?
A. We found the two together, the value of the tangible and the intangible, as the law directs.

Mr. HILL: I think we had better strike off "as the law directs."
The REFEREE: Strike out "as the law directs."

By Mr. PAGE:

Q. In case of the Metropolitan Street railway, in which case the assessment, including the tangible property, has been fixed
72 by the board at $18,377,911, are you able to state what portion of that assessment constitutes the value of the tangible property included in that amount?

Objected to upon the ground that the tax commissioners, being judicial officers, cannot be examined as to their acts; that their acts

speak for themselves and they cannot be interrogated or examined as to the manner in which they arrive at the assessment or as to how the assessment is made up; after argument the objection was overruled; exception.

A. No; I am unable to differentiate.

Q. In respect to the various other companies, Mr. Priest, the assessments of which are before us in this proceeding, do you make the same answer to a similar question?

Same objection, ruling and exception.

A. I do; yes, sir.

Q These assessments were made by the board, were they not, at the time they were finally arrived at; I refer now to the various assessments which were made by your board in the case of these various railroad companies which we are now considering; the various assessments which were finally entered upon your rolls were assessments which were fixed by the entire board?

A. Yes, sir; by the three commissioners.

Q. You were present when these various assessments were made?

A. I was, in each and every case.

Q. Was there any differentiation made?

A. As between the tangible or intangible?

Q. Yes?

Same objection, ruling and exception.

A. No, sir; there was not.

Q. The Metropolitan Street railway, Mr. Priest, specifies in
73 its return some eighteen several franchises; I now refer to Schedule C; when your assessments were made in the case of that company did you consider separately the several distinct eighteen franchises or did you consider all of the franchises together in arriving at your assessment?

Same objection, ruling and exception.

A. Won't you be more definite in that question, please; do you mean as to any one of these constituent lines?

Q. No; I am speaking of the Metropolitan Street Railway Company?

A. The system as a whole?

Q. No; I now lay before you an exhibit, which is known as Exhibit No. 61, and that shows the lines which are owned by the Metropolitan Street Railway Company; I differentiate between the expression "company" and "system;" there are here eight distinct colors, but, according to the return, these constitute all together fourteen franchises; now, I ask you, in fixing the assessment upon the franchises of this system, did the board assess each franchise separately or did you assess all the franchises of the Metropolitan Street Railway Company together; again I discriminate between "system" and "company;" I now mean the forty-seven miles of

track owned by the Metropolitan Street Railway Company, and which track extends over eighteen franchises?

Objected to on the same ground, and, further, that it appears by the assessments as to what was assessed, and the evidence is incompetent and improper; objection overruled; exception.

A. The certificate of valuation found by us would show that, I think, which you have in mind.

Q. The assessment against the Metropolitan Street Railway Company is $18,000,000?

A. You are speaking of the Metropolitan railway?

74 Q. Yes; that company owns eighteen franchises, acquired at different dates?

A. If that valuation is certified by us at $18,000,000.

Q. Does that indicate to your mind in assessing them you took them all as one franchise?

A. Yes; that was taken as one franchise, if that is the total of the valuation of that line.

Q. With respect to the various other companies whose assessments are now before the court in this proceeding, do you make the same answer to a similar question, namely, where there is one assessment in your return or in the record in case of one company that indicates all the several special franchises of that company were assessed as one franchise?

A. Yes; if I understand the question, that is the answer in each case.

Q. The Broadway Surface Railway Company, or the Broadway Surface Company franchise, which is one of the franchises of this company indicated upon this map, runs from the Battery to Fifteenth street; this distance of several miles is a part of the forty-seven miles constituting the entire mileage of that company; in fixing your assessment did you put a separate valuation upon this Broadway surface line, which runs from the Battery to Fifteenth street, or did you include the valuation upon this franchise with the valuation which you put in the aggregate upon the various franchises of this company.

A. I think we found that valuation, the Broadway and Seventh avenue—if I may see the report, please (referring to the report).

Q. The different franchises of this system are represented here in eight colors; altogether there are eighteen distinct franchises; as I understand it, you assessed or made one assessment against all the railroad lines which are represented upon this map, understanding that they are all the lines owned by the Metropolitan Street Railway Company and constituting in the aggregate some forty-seven miles?

75 A. Yes, as reported; we fixed the valuation upon these constituent companies as they were reported, if that answers it.

Q. Unless there was, and unless there appears upon your assessment-rolls, a separate assessment for each separate franchise, you did not, in arriving at your valuation, fix a separate assessment?

A. No; it was treated as the one franchise even though there might have been several in the same line, if it was reported to us as one constituent company.

Q. Did the board, in making this assessment, consider that all of the lines owned by the Metropolitan Street Railway Company were connected?

Same objection, ruling and exception.

Q. That is to say, the Broadway line shown upon this map, which is owned by this company, stops at Fifteenth street and begins again on Broadway at about Sixty-sixth street, there being no railway franchise owned by the Metropolitan Street Railway Company for the road which runs from Sixty-sixth street along Broadway to Fifteenth street?

A. Your question is, whether we consider that as continuous mileage or not?

Q. Whether in making this assessment of $18,000,000 upon these railway lines here you assumed there was a connection and continuous route on Broadway through its entire length from the Battery to One hundred and sixth street?

A. We had the exact mileage of it as reported to us by the company; I can't recall that detail now.

Q. It being the fact that the Metropolitan owns no franchise between Fifteenth street and Sixty-sixth street upon Broadway, did you consider that they had the right, acquired from the other companies, to operate a continuous line from the Battery to One hundred and sixth street?

76 A. If they did have such right it was considered by us at the time.

Q. You did consider the fact that this company operates a continuous line along Broadway, from the Battery to One hundred and sixth street?

A. Yes, sir; I think that would be true.

Q. Did you consider, or did the board consider whether or not the Metropolitan Street Railway Company owned the right to run on Broadway, from Fifteenth street to Sixty-sixth street, or whether they leased the right?

A. Yes, sir; that was considered.

Q. What effect was given to the consideration which you now refer to?

Objected to upon the same grounds as heretofore, and that the inquiry cannot be made of the commissioners as to their mental attitude toward any of these questions.

The REFEREE: The question is what they did.

Mr. FIERO: That I don't object to.

Q. Did you consider that the franchises of the Metropolitan Street Railway Company were more valuable or less valuable by reason of the fact that they had acquired the right from other companies to

run on Broadway, from Fifteenth street to Sixty-sixth street and does give continuous roads the entire length of Broadway?

Same objection; objection overruled.

A. I have no recollection of the operations of my mind at that time, but as a general proposition I should say most certainly that would have been the view taken of it.

Q. Was this same rule applied in case of the assessments which you made with respect to the various other street railway companies in New York which you assessed?

77 A. Whether they were continuous lines owned by the company or whether the connection was made through lease of other companies?

Q. Exactly?

A. Yes; it would seem to me they would be more valuable because being made continuous.

Q. In making these various assessments, did you consider in all cases whether or not one company had a contract with another company to run over its lines?

A. Yes; we had copies of those contracts, I think.

Q. Did you regard that as an appreciating circumstance or a depreciating circumstance in your valuation?

A. Well, where they guarantee very large dividends it would be hard to tell which would derive the greater benefit, if that be the object of the inquiry?

Q. In case of companies which had contracts to use the lines of other railroad companies, did you regard that contractual arrangement as valuable to the company possessing it?

Objected to as indefinite.

A. They both possessed it.

Q. That is to the operating company which operated over the lines of the other company?

A. Certainly I should hold that of value.

Q. You did regard it as of value?

A. Certainly we regarded it as of value.

Q. Did this consideration enter into the assessment which the board placed upon the various special franchises of each company?

A. We endeavored to consider all the elements, including this one.

Q. That was an element which, in the judgment of the board, added to the value of the special franchise, did it not?

A. I would like to answer that question intelligently, but first I must understand it.

Question repeated.

78 A. The fact of their having control and operation of these leased lines, is that it?

Q. Exactly?

A. Yes, it did.

Q. Is that true in case of each company which had a contractual arrangement with another company, namely, that this contractual arrangement was regarded as valuable and you so considered it in making the assessment upon the special franchise of each company.

A. Yes, the nearer it became an entirety the greater the value.

Q. Did you consider, in making your assessments, a map showing the entire system of the Metropolitan Street Railway Company?

A. We had such a map and used it.

Q. Did you, in fixing your valuation of the special franchises of the Metropolitan Street Railway Company, consider that this was one system operated as a whole as differentiated from these several franchises as operated by the several companies owning the same?

Same objection, ruling and exception.

A. Why, we fixed the valuation upon these constituent companies as they were reported to us on June 30, 1899.

Q. Did the board value the franchises of all the companies comprised in the Metropolitan Street Railway Company system as undivided parts of an entire system or several companies operated or controlled by one company?

A. No; where they were reported as an independent property by the Metropolitan they were so treated and valued by the board.

Q. Did the board personally view the various lines with respect to which reports were made by the Metropolitan Street Railway Company?

A. I never viewed it all personally.

79 Q. Did any other member of the board, so far as you know?

A. Not to my knowledge.

Q. In arriving at the assessments which were placed upon the various franchises of the component companies of the system was there any discussion or consideration of the various special franchises owned by each company?

Objected to as incompetent.

The REFEREE: I will exclude that.

Question withdrawn.

Q. Did the board, in valuing the various franchises of these various companies, take into consideration, among other matters, the market value of their securities; that is to say, their stocks and bonds?

A. Yes, sir; the market value of those securities, the capital stock and the bonds were considered as they were reported in the "Financial Chronicle" of January 7, 1900.

Q. Were these various figures aggregated together so that you had before you at that time a sum total representing the market value of all the securities, stocks and bonds of the system?

A. Yes, sir; they were so aggregated.

Q. This market value was a figure that exceeded $100,000,000 in amount, was it not?

A. Considerably more, if my recollection serves me.

Q. Do you recall what the figure was?

A. Yes, sir; it was, in my recollection, it was somewhere between $150,000,000 and $160,000,000.

Q. Was this regarded by the board as an appreciating or a depreciating element in making their assessments upon the various several franchises?

A. If I may be permitted to say, it was simply taken for what it might be worth; it wasn't accepted as conclusive or as an absolute measure of value.

80 Q. But it was accepted as showing that they, that is, the special franchises, were very valuable, was it not?

A. Yes, we took it as an element, a factor, for what it was worth.

Q. Did the board at this time, when you had this figure before you, make any deduction from the total referred to as amounting to $150,000,000 or $160,000,000, starting with that as representing the value?

The REFEREE: He has not said he started with that as a basis.

A. I didn't state that; I stated we took that as one of the elements for consideration.

Q. Did you at any time, in making these special franchise valuations, start with that as a basis?

A. No; it was given consideration; I can't say it was a ground or a basis, but it was considered among the other elements.

Q. What other elements were considered by the board at this time in connection with the market value?

A. The earning power of this property as reported to us by the company.

Q. When you say the earning power, do you mean the earning power of the system which had stocks and bonds aggregating a market value of $160,000,000?

A. Yes; or where they were separately reported to us in their report of June 30, as they were in several instances, they were separately considered.

Q. But unless they were separately reported you did not consider, did you, the earnings from each separate franchise by itself?

A. No, we couldn't do that, unless it was set forth.

Mr. HILL: That is not an answer to it.

The REFEREE: As he takes it down it is an answer. He says no, he couldn't.

81 Mr. HILL: We ask to strike out the answer.

Mr. PAGE: Everything after "No," as being irresponsive.

The REFEREE: Strike out everything after "No." It is an explanation that is of no account.

Q. What other elements did you have before you in making your assessments and valuations?

A. We had first the report of the corporation, the original report, to which there were subsequently supplemental or special reports,

as we called them; we availed ourselves of the State railroad commissioners' reports, the records of the State comptroller's office; we had the reports of the New York city department of assessment and taxation; we had the information of the experts retained by our board on behalf of the State and of our confidential appraiser and special agent; we had Poor's Manual; we had the "Financial Chronicle."

Q. Did your board call for any information with respect to each specially granted franchise owned by each company?

A. I don't recall now; we had some correspondence with your company; the records would show; that would be included in the return.

Q. The reports, namely, the principal report, containing questions requiring information, and the two supplemental reports, contained all the statistics which were asked for by the board of the various companies?

A. No; I think there was a letter also; I am not sure; perhaps not in this company's case.

Q. You have given us the various matters which you considered in arriving at your assessment; did you, in connection with other matters and other information which was laid before you, consider the opinion of Mr. Fiero, submitted to the State Board of Tax Commissioners September 28, 1899?

A. We did; yes, sir.

82 Q. In making your assessments were you governed, or was the board governed, by the principles which are laid down as proper principles to be applied to the matter in hand by Mr. Fiero in this opinion?

Objected to as incompetent; objection sustained; exception.

Q. I show you a document entitled "Assessment of special franchises," submitted to State Board of Tax Commissioners September 28, 1899; is this paper one of the papers which was before the board in making its valuations and in fixing the assessments of the various railroad companies?

Objected to as immaterial; objection sustained; exception.

Q. Having before you the documents and papers and information to which you have referred, will you please state the method which was applied by the board in arriving at the several assessments?

Objected to upon the ground that the evidence is not competent under the decision of the appellate division, and on the same grounds as before; objection overruled; exception.

A. If you mean by "method" the rule, a fixed rule, there was none applied; each property was treated individually and upon its own conditions.

Q. Selecting now the Metropolitan Street Railway Company, the map of which is now placed before you, will you please state what

method was adopted by the board in fixing the assessment of the Metropolitan Street Railway Company at $18,377,911?

Same objection, ruling and exception.

A. All of the elements, factors and considerations which we had been enabled to gather were considered by the three commissioners, and their minds seldom met at the beginning; this valuation was the result of very much discussion, as were most of the other important—I cannot tell you what was in the minds of the other commissioners, nor, indeed, after making each year some 5,000 valuations upon these franchises, can I tell you even vaguely what passed through my own mind at the time of the making of this particular one; but undoubtedly the report of the company was made the basis.

83

Q. Was there any rule adopted in the case of this company; you have stated, as I understood you, that the rule varied with the different companies; but was there any rule or principle adopted by the board in making this assessment of the Metropolitan Street Railway Company?

Same objection, ruling and exception.

A. No, sir; there was no fixed rule.

Q. Did you arrive at this result as being a fair value without the application of any specific rule?

A. Yes; the board as a whole agreed that was a fair valuation.

Q. Did you consider, in fixing your valuations, the rules or principles applied for assessing franchises in other States?

Objected to as too indefinite and general; objection sustained; exception.

Q. Are you able to state, with respect to this particular assessment, whether or not this assessment was arrived at without any examination by the board of the lines operated by this particular company; that is to say, the lines which are assessed at $18,000,000?

A. Do you mean by personal visitation to the property?

Q. Yes; by the board or any member?

A. The board did not, or any member, to my knowledge, personally visit the line.

Q. Did you arrive, or in making these various assessments deduct from the amount before the board the funded or bonded indebtedness of the various companies?

84

A. No, sir; we did not.

Q. Was no deduction made in the case of any company which was assessed by you, or was no deduction made from the proposed assessment of any company which was assessed by you for its amount of funded or bonded debt?

A. No, sir; we considered that as an element of value, if considered at all.

Q. Did the board take into consideration the tax rate fixed upon

real estate in the several counties in which these various companies' lines are located?

A. It did.

Q. Will you state in what way they took into consideration the tax rate.

A. It was considered; I can't tell you in just what way.

Q. Take the Metropolitan Street Railway Company, which is located in New York county; did you take into consideration the tax rate in New York county?

A. Yes, sir.

Q. What use did you make of the tax rate which prevails in New York county in arriving at this assessment?

A. It was one of the questions submitted in the blank printed report to which answer was made, and like the answers to all the interrogatories in this blank it was considered; one of the elements in this case.

Q. Will you now state in what way you valued the tangible property connected with the use of the special franchise owned by this company?

Same objection; objection overruled; exception.

A. The value of the tangible property was reported to us by the company, and it was also valued by our experts and appraisers.

Q. You made no personal valuation of it as a board?

A. We didn't personally visit it and fix a value.

Q. Are you able to state whether or not the valuation which was placed upon this property (I refer now to the tangible property), was based upon the cost of reproduction or replacement of the tangible property connected with each special franchise.

85

A. Yes; it was based upon what we termed the present value, or the value of the property at that time; perhaps I should say in explanation that although these reports were of a date as of June 30, 1899, these valuations found by us should be considered as of the date of January 7, 1900; these New York county valuations and the tangible was considered of the value at that time.

Q. Was this valuation based solely upon the cost of reproduction so far as you recall it?

A. Yes; cost of reproduction; this present value with an allowance for depreciation in the property, the age being stated, etc.

Q. Have you any figures—has the board any figures which show the amount at which the tangible property connected with each special franchise was valued?

A. I think not, except the report of the company.

Q. So that in making these assessments against each company, as I understand you, you fixed a certain figure as covering the value of the tangible and the intangible property together?

A. Yes, sir.

Q. And no rule or principle, or general principle was adopted in the making of these various valuations?

A. There was no fixed rule.

Q. Were the net earnings of the companies taken into consideration by the board in fixing these assessments?

A. Both the net earnings and the gross earnings.

Q. If the net earnings were large, the assessment was correspondingly increased as compared with a company the earnings of which were less?

A. I think I may say yes, because they would measure the earning power of the special franchise.

Q. Then the earning power of the franchise was primarily the consideration which the board adopted in fixing its several assessments?

A. I will answer by saying it was a very important factor in the minds of the board.

86 Q. Was there any factor more important or more controlling than that, except the market value of its stock and bonds?

A. No; I think there was no element more influencing the board than the earning power.

Q. As I understand you, the board adopted the rule of considering the earning power and the market value of the stock and bonds of the several companies as the most important considerations of an appreciative character in fixing the assessments of the various companies?

Objected to as not fairly stating what the witness has said.

A. If you will say "important elements" I will answer in the affirmative.

Q. Were they not in point of fact more important than any other elements as considered by the board in fixing its assessment?

A. In this case of a road being actually operated I should say they were two very important elements, but there were cases in which we found franchise valuations where there were no earnings and very slight showing of market value for securities; so I can't answer generally.

Q. I do not ask you generally, but I now refer to the companies composing the Metropolitan Street Railway Company system and the other companies in the city of New York?

A. They were two very important factors in the consideration given the properties by this board.

Q. Were there any other factors of equal importance in arriving at the value of these various special franchises on the part of the board?

A. Not that I now recall.

Q. In assessing these various special franchises, did you consider that a surface railway which had changed its motive power from horse power to underground electrical power was more valuable after the motive power had been changed than it was before the motive power was changed?

A. Yes; that would be evidenced in the receipts.

87 Q. Do you make the same answer in case of horse railways which had been changed to cable or which had been changed to the overhead trolley system of electricity?

A. I think my former answer would cover that, that it would be measured by the earning capacity, and certainly, whether cable or electric road, would certainly have greater earning power than if it had only horses as motors.

Q. Did you, in case of any companies of the Metropolitan system or any company in the city of New York, take into consideration the percentages in the nature of a tax which were already being paid by the companies to the cities?

A. Yes; they were reported to us and were considered as a part of the report made to us.

Q. Were they capitalized in any case to show what the value of the property was that could pay taxes to that amount?

A. No; I don't think they were, because it was immaterial, because from the tax based upon any valuation which we might find those burdens would be deducted.

Q. Did you not consider, in case of the Broadway Surface Company, the Broadway and Seventh Avenue Company, did you not consider the fact that it had agreed and had paid to the city $150,000 a year as license fee or tax to the city, a fact indicating or a fact bearing upon the large value of that franchise?

A. Yes, sir; we did give weight to that fact.

Q. So that, in all cases where a company had agreed to pay a heavy percentage to the city of its gross receipts and had paid those percentages to the city, that was taken into account as indicating that that particular franchise was valuable?

A. Yes, sir; that is true.

Q. Valuable in proportion as it had agreed to pay to the city a greater or less percentage of its gross receipts?

A. Yes, sir; you may go further and say we applied the
88 same gauge to the list made of the Madison Avenue line, the Fourth Avenue line.

Q. Will you kindly explain what you have in mind?

A. That is in line with the questions which you have just been putting.

Q. My question; will you kindly go a little further into that line and explain it?

A. Certainly, if you wish it.

Q. If you will?

A. It is my recollection that the 17 miles of road was leased by the Metropolitan system of the Harlem; that it was to pay something like $360,000 a year for eight years; thereafter, I think, something like $400,000, and that was taken somewhat as the measure of the value of that franchise, it being a franchise pure and simple, it previously having been a horse road and converted to an electric road.

Q. The greater the sum agreed to be paid under the lease in such

case as that the larger the assessment which, in the judgment of the board, was placed upon the line covered by the lease?

A. Yes, sir.

Q. The various valuations of the various franchises are in irregular figures; that is to say, they are not in hardly any case round figures; is that due to the fact that any special system was applied?

A. No, sir; it represented the fact that we had difficulty in arriving at the sum.

Q. Was the amount of money agreed to be paid by the Harlem Company under this lease the most important factor as regarded by the board in fixing this assessment upon this line?

A. I think it was a great aid to the judgment of the board in arriving at a valuation of that particular line.

Q. In cases where there was a lease of a line, as in that case, did the board pay any special attention to the gross earnings of
89 that particular road as distinguished from the amount of money that had been agreed to be paid under the lease?

A. To which did it attach most importance?

Q. Yes; in case of that road; was it not the fact that the value of the lease, or the amount of money agreed to be paid under the lease, was the controlling consideration in assessing that particular franchise?

Objected to as incompetent; objection sustained; exception.

Q. You have stated in one of your prior answers that you had great difficulty in arriving at a valuation of these various franchises; will you state from what considerations the difficulty arose?

A. The difficulty arose from making the minds of the three commissioners meet.

Q. Did you find any difficulty in the subject with which you had to deal, namely, the valuing of a special franchise of an intangible character?

A. No; I think the same difficulty would have arisen on the tangible possibly, the difficulty of making three pretty firm minds meet.

Q. Did the board take into consideration, in arriving at the value of these special franchises, the entire value of the corporate assets of the company?

A. Yes, sir; they were considered.

Q. Were they considered as an appreciating factor where they were large in amount?

A. Yes, sir.

Q. Did you deduct the indebtedness of the corporation in any case for the purpose of arriving at the value of its taxable assets?

The REFEREE: He stated they did not deduct.

The WITNESS: If there were bills payable they would be considered, of course.

Q. Did you take into consideration for any purpose in
90 valuing these special franchises the power-houses and real estate off the line of the road?

A. Yes, sir.

Q. Where the company had or owned a large power-house, was that regarded as evidence of the fact that the special franchise of that company was more valuable than the case where a company had no power-house?

A. No; it was not considered for that purpose.

Q. For what purpose was it considered?

A. As showing the total assets of a corporation property outside the street and property in the street.

By the REFEREE:

Q. Do I understand you to mean that it was considered as part of the tangible property?

A. Well, not for the purpose of our valuation, because we had to value only that tangible property which was in the street, together with the right to have and use it there; but it would be represented in the total assets of the company—the property outside of the street, of course, would be included in the capitalization of the company as well as its personal and other property.

By Mr. PAGE:

Q. At the time the first assessment was made in the case of these various companies the Third Avenue Railroad Company was in financial difficulty, was it not?

A. I think so; yes, sir.

Q. The Metropolitan Street Railway Company, as indicated by its return, was in a highly prosperous condition, was it not?

A. Yes, sir; I think so.

Q. Did the board, in fixing the value of the special franchises of the Third Avenue Company, take into consideration the fact that the company at that time was in financial difficulties and that its earnings were comparatively small?

A. It did; yes, sir.

91 Q. So this circumstance, to wit, the financial difficulties in which the Third Avenue Railway Company was then in—was this a consideration which operated in depreciation of the amount which was fixed by the board upon its special franchises?

A. Yes, sir; I think a lesser valuation was fixed than would have been under more favorable conditions.

Q. The Metropolitan Street Railway Company operated its system by transfers at various points of intersection with the lines of other companies; was this fact regarded as a circumstance which enhanced the value of the property generally?

A. It was considered as a factor, its transfers.

Q. Of an appreciative character in the fixing of the assessment?

A. If it increased its business that would be evidenced in its receipts.

Q. This consideration took place whether or not the transfer was between lines owned by the same company or between lines owned

by different companies so long as they were operated as a part of the general system?

A. Yes, sir.

Q. Is what you have said now with respect to the Metropolitan Company and the transfer situation equally true with respect to the other street railway companies in the city of New York?

A. It is; yes, sir.

Q. Before the lease the Harlem line was operated as one company and gave no transfers; since the lease it has been operated as a part of the Metropolitan Company system, and cars have been run continuously over its line and over other portions of the Metropolitan Company system; was the circumstance that the business of the Harlem line has increased under this new arrangement one which, in the judgment of the board, increased the value of that special franchise?

92 A. The latent value of the franchise may have been there all the time, but it is certainly being better developed under present management than theretofore.

Q. The new management was taken into consideration in fixing the assessment upon the Madison Avenue line, was it not?

A. The measure of the valuation found by the board upon that franchise was largely the measure fixed by the Metropolitan system itself in that sum which it paid for it in rentals.

Q. Didn't the fact that after the lease it was operated by the Metropolitan Street Railway Company add, in the judgment of the board, to the value of that special franchise?

A. Yes, sir; I think it did.

Q. Is it not a fact that these various special franchises, when this subject came up for consideration before the board, that the special franchises operated by each company which were assessed were regarded as parts of an undivided system operated as a whole?

A. As parts of a whole, they were so considered; yes, sir.

Q. Is it not a fact that the board, in arriving at these various assessments, from the want of any general rule which would apply in all cases, did in each special case assess the special franchise against the company owning the same at what the board thought was fair?

A. Yes.

Q. Isn't it the fact that the board was unable to devise or find any general rule or principle to adopt in making these various assessments?

A. That is true.

Q. Isn't it the fact that the board was, in the nature of things, constrained in most cases to conjecture what it thought would be the fair value of these special franchises, of taking into consideration those matters which you have heretofore mentioned?

93 A. I think all assessment is far from an exact science; I am not willing to answer these were guesses or conjectures.

Q. Was there a special method which you found you could apply

and with which you could figure out the assessment in any particular case?

A. If you mean by that a rule such as taking any certain percentage of gross or net receipts, no; it would make large and valuable franchises pay ridiculously small taxes; it would crush out the smaller franchises throughout the State.

Q. For that reason you did not apply that rule?

A. We did not apply that rule.

(Mr. HILL:)

Q. Did not apply any general principle?

A. Any general rule.

Plaintiff's counsel, Mr. Page, offered in evidence the document marked for identification this day, the report of the State Board of Tax Commissioners of the State of New York, dated January 25, 1901.

Objected to upon all the grounds heretofore stated to the reception of the table of valuations, and as irrelevant.

Plaintiff's counsel, Mr. Page, offered in evidence the first twenty-nine pages, being the portion from which particulars have been read.

Same objection.

The REFEREE: I suppose the report is only competent so far as it states facts bearing upon any issues here.

Mr. HILL: And throws light, their recommendations throw light upon what has already been done, as your honor will see when we come to argue the case.

Mr. FIERO: That the people are not bound by their recommendations?

Mr. HILL: That is a different question.

The REFEREE: I don't see how a mere recommendation or
94 argument or anything of that kind in their report is competent so far as it states any facts bearing upon these issues; it is probably competent under my ruling.

Mr. FIERO: Those matters we would like to have them offered separately so that we can get the benefit of an exception to them.

Q. In valuing the property here in the State of New York, was any consideration given by the board to the question of whether or not the assessment under the special franchise law against railroad companies in New York city was unequal or not as compared with other real estate in the city of New York not constituting special franchises?

A. I don't understand the question.

The REFEREE: I don't see how it is important; they return they have assessed these franchises at their full value.

Q. You have returned all these special franchises assessed at full value, have you not?

A. That was our intention at the time of making the valuation.

Q. Your return was correct in that particular; you have returned you assessed these special franchises at their full value?

A. It was our intention of doing it at the time of making the valuation, making a full, fair value.

Q. In the city of New York and in the other counties of the State, real estate is not assessed in all cases at its full and actual value is it?

Objected to on the ground the witness is not competent.

Question withdrawn.

Q. You signed this report, did you not, that was made to the legislature this year, dated January, 1901?

A. I did; yes, sir.

Q. This report contains this statement: "The law should
95 authorize and direct this board to equalize, after hearings, special franchise valuations found by it to conform with the local assessment of other real estate in the tax district where special franchises exist, upon such proofs and information as the board can obtain. Such authorization will afford the warrant of law for supplying a remedy in the first instance to corporations. The corporations are now compelled in every case, involving great or small amounts, to resort to a court proceeding for a reduction which this department may be willing to admit is equitable, but is not by the law, in its present reading, permitted to make;" you recall that statement, do you not?

Objected to as incompetent; objection sustained; exception.

Q. You are familiar, are you not, with tax matters generally through the State; you have no other business that engrosses your time?

A. No, sir; I surrendered all other business save this for the last two years and a half.

Q. Your time for the last two years and a half——

A. (Interrupting.) Has been exclusively devoted to this business.

Q. You have investigated the tax rates in the various counties of the State?

A. I have; yes, sir.

Q. You are familiar with the ratio which prevails between actual value and assessed value in various counties of the State?

A. I have aided in fixing such percentages, the tables for the last two years.

Q. This fixing of percentages to which you refer proceeds upon the ground, does it not, that the actual value of the property in the various counties differs from the assessed values?

A. That is true.

Q. Is that the fact?

A. It is the fact.

96 Q. Is it the fact in the city of New York that the actual value differs from the assessed value?

A. We so find officially.

Q. In your judgment, I mean, as a tax expert, spending all your time in the investigation of matters and statistics relating to taxes throughout the State?

A. In my judgment they are not assessing property in New York city, or New York county, at its full, fair, actual value of full 100 per cent.

Q. For the year 1900, what was the relation between assessed value and the actual value of property in the county of New York; I now refer to real property?

Objected to upon the ground it cannot be proven in this way; it can only be proven by showing the actual value and the assessed value; the evidence is not competent; it is simply a conclusion.

Mr. PAGE: Mr. Priest is the highest tax official in this State. For two years and a half he has spent all of his time in investigating this subject and nothing else. He says he has personally investigated this matter in New York county and all other counties of the State.

The REFEREE: If he can answer that as a fact, he can answer it.

Mr. FIERO: After all, it is a mere matter of opinion. If you would call Mr. Feitner, who is the tax commissioner down there, he might say it was assessed at 120.

The REFEREE: We will assume he has investigated it and ascertained the real value and the assessed value of properties down there; perhaps you had better ask him that question first, whether he has ascertained by investigation the real and assessed values of the property.

Q. Have you ascertained by investigation the real and assessed values of property in the city of New York?

A. Yes.

97 Q. What was the relation in the year 1900 between assessed value and the actual value of real property in the county of New York?

Same objection; objection overruled; exception.

A. In my judgment it was 67 per cent. of full, fair, actual value; I am speaking of the real value; real estate was assessed at 67 per cent. of its full, fair value; this finding is based upon the assessment-rolls of 1899.

Q. Take to-day as distinguished——

A. (Interrupting.) I wouldn't like to commit myself because we have to pass officially upon that the first Tuesday in September next.

Q. Is there any substantial difference?

Defendant's counsel objected to any evidence of any other year except evidence of the year in question; the assessment of 1899 as equalized in 1900.

Mr. BROWN: We can take his opinion as to the percentage of valuation on the assessment-rolls of 1900.

Mr. FIERO: That we object to as immaterial and irrelevant to this issue.

The REFEREE: Confine it to the year we are inquiring about.

Mr. BROWN: It may be Mr. Fiero is right, but our assessment was made in the spring of 1900, and we do not want to be met hereafter by the assertion we have not covered the assessment of the proper year.

Mr. FIERO: There is no question but that is the assessment to which Mr. Priest refers.

The REFEREE: He is talking about an assessment that became fixed the second Monday of January, 1900; that is the assessment we are concerned in here.

The WITNESS: That is correct.

Mr. BROWN: If the attorney-general will concede that this
98 opinion just given applies to the proper year applicable to this proceeding?

Mr. FIERO: It applies to the assessment made in the year with regard to which we are now litigating.

Mr. BROWN: It is only a question whether we have got to compare the other assessment of 1900 or 1899.

Mr. FIERO: We call it the assessment of 1899 because it is laid in the country in December.

Mr. BROWN: Let us take a concession on the record that the comparison, for the purpose of determining whether the property was assessed at a higher proportion than other real estate, is to be made with the assessment-roll in the county of New York of 1899.

The REFEREE: Which became final on the second Monday of January, 1900. That is the assessment-roll we are dealing with here.

Mr. BROWN: That we all agree on.

The REFEREE: I suppose there is no dispute about that.

Mr. PAGE: The figure which Mr. Priest has given with respect to that period is 67 per cent. as the relation between assessed value and actual value of 100.

It is conceded that the testimony given by Mr. Priest as to the relation between the value of assessed property and the actual value of real property in the city of New York as 67 per cent. covers the year which these certiorari proceedings are to review the assessment of.

Q. I have understood from you that in case of the tangible property connected with special franchises you endeavored to apply the rule that the cost of reproduction was the measure of value; am I correct in that?

The REFEREE: He answered the question in this way: The cost of reproduction taking into account depreciation.

The WITNESS: That was my answer.

99 Q. This was a general rule applied in all cases, was it not?

A. Yes sir.

Q. Is it not the fact that you were unable to apply any analagous

general rule to the case of the special franchises which the board assessed the value of?

Objected to as having been gone over and inquired into.

A. There was no analogous rule for the treatment of intangible property, certainly.

By Mr. PAGE:

Q. When you have said in your previous testimony that you took into consideration various matters which had been referred to, you mean the board?

A. I mean the board.

Q. When you say you took into consideration the earning capacity of a particular railroad, you mean, as I understand you, that the earning capacity figured as an element or factor in the final assessment of each company as fixed by the board?

A. That is true.

Q. Is that true in case of all the street railway companies whose proceedings are under review?

A. That is true.

Q. Is the same true of the corporate assets, the market value of stock and bonds and other matters which you have mentioned in your testimony as matters taken into consideration?

A. That is true.

Q. Namely, that they were all figured as factors in the final assessment?

A. They were all considered.

Q. And were appreciating factors in the assessment as finally fixed?

A. Yes.

Q. The lease of the Harlem Railroad Company to the Metropolitan provides for a rental of $365,000 a year; that capitalized
100 on a ratio of 20 to 1 makes approximately the sum of $7,000,000; your first tentative assessment, I refer now to the tentative assessment fixed by the board, was $7,702,000; is it not the fact that in fixing this tentative valuation, and the final valuation, which is $6,405,000, that the rental from this lease capitalized was the primary consideration in fixing the assessment?

A. It certainly was a very important element; I can't say that it was the only one.

Q. In this particular case, did not the board capitalize the value of this particular lease in that manner capitalize the rent amounting to $365,000?

A. That was considered—I can't say that was the sole measure of the value fixed.

Q. The capitalizing process, the capitalizing method, was adopted in fixing that assessment value as one of the factors?

A. We considered the rental value fixed by the lessee company; certainly.

Q. You capitalized, did you not, also, in considering the various matters relating to that railway company?

A. I have no distinct recollection of having capitalized it myself.

Q. Wasn't the capitalized value of this lease a matter that was considered by the board?

A. That is true.

Q. It was one of the factors which entered in the assessment as finally completed?

A. That is true.

Q. Is this true of other lines of the Metropolitan system which is the subject of lease by one company to another?

A. Yes, sir; I think it is.

Q. The papers show that the Twenty-third Street Railway Company, when that special franchise was originally granted by the legislature, was put up at auction and sold, and the price obtained for the same was $150,000; do you remember whether or not
101 that figure, namely, the price obtained at that sale for this special franchise, was considered by the board as an element or factor in fixing the assessment of that company?

A. I think it was considered; yes, sir; we had the fact before us.

Q. You had the fact before you?

A. Yes, sir.

Q. Referring to your statement that you followed no fixed rule in valuing the intangible franchises of the various companies, have you covered all the elements which were taken into consideration by the board; in other words, is your enumeration, so far as you recall it, complete?

A. I think so; yes.

Q. You have stated that you took into consideration both the net and gross earnings as appreciating factors in valuing these franchises of the Metropolitan Street Railway Company; by you I refer to the board; did you take into consideration the profits from the operation of the Metropolitan system as an appreciating factor in the valuing or fixing the final assessment of the various special franchises?

A. Yes, sir; it was considered.

Q. Is it not the fact that no specific oath was taken either by you or by the experts of the board who made valuations and gave information to the board?

A. In each instance do you mean?

Q. Yes?

A. Simply the certificate of valuation made by the three commissioners; that is all, or by the secretary for them.

Q. No oath was administered to the individual making those certificates?

A. The certificates were issued by our secretary by our order; he is a sworn officer and each one of the commissioners is a sworn officer.

Q. This certificate is the only verification which there was in respect to those statements?

A. That is true.

102 It is stipulated that the testimony of Mr. Stearns and of Mr. Leaycraft, the other commissioners of the board, who have been present at this hearing at which the testimony of Mr. Priest has been given, is deemed to be given by those gentlemen as witnesses in this proceeding and that their testimony is and is to be deemed to the same effect and to be of the same tenor as the testimony of Mr. Priest, subject to the same objections and the same exceptions as taken to the testimony of Mr. Priest.

Mr. PAGE: In making this stipulation we do not mean to regard it as waiving the right to call Mr. Priest again if necessary.

(NOTE.—The following testimony of Mr. Priest was taken for all cases on September 4, 1901, and is a part of the record in this case, according to stipulation.)

GEORGE E. PRIEST, recalled.

Examined by Mr. PAGE:

Q. Have you read over your testimony in the Metropolitan case since the last hearing?

A. I have had a chance only to glance at it; for the last week I have been very busily engaged on the State equalization table.

Q. In that testimony were enumerated various facts and matters which the board considered as factors or elements entering into other valuation of assessments, do you remember?

A. Yes.

Q. Has anything occurred to you since the last hearing as being a fact or matter which the board considered as factors or elements entering into their valuations or assessments upon which the basis of valuations and assessments were made other than what you referred to in your previous testimony?

A. No: only this occurs to me in that connection that I might have added that those factors or elements which were considered——

103 Mr. PAGE (interrupting): You have answered the question.

Mr. FIERO: He has a right to complete his answer.

Mr. PAGE: I ask only the specific question as to whether you omitted, so far as you recall, any specific fact?

Mr. FIERO: I submit Mr. Priest has a right to answer the question put to him.

The REFEREE: Complete your answer to the prior question.

A. I don't know that I would add anything to that except this, that these factors and elements as then considered——

Mr. PAGE: I object as not responsive.

A. (Continuing:) I omitted to state the facts, these elements and factors were taken into consideration for the formulation of the tentative value after which we had the guidance of the statements and the evidence and the affidavits and the arguments put before

us at the hearings upon which to review these tentative valuations and find the final as certified by us.

Q. With respect to these franchises which were owned by individuals and assessed against them it is a fact, is it not, they aggregated something in excess of a hundred all together?

A. There were several hundred.

By Mr. BROWN:

Q. Won't you answer the question first asked you; is there any fact which the board considered in determining the value of these special franchises which you have failed to enumerate?

A. I couldn't answer that; I suppose there were a thousand facts.

104 Q. Is there any fact that you considered that you have not enumerated that you can now state?

A. No; I cannot.

By Mr. PAGE:

Q. At a prior hearing in one instance you were asked whether your testimony, as given with respect to the Metropolitan Company, also applied to other companies in the city of New York; I understood then, and ask you to confirm me if I am right, that the testimony applicable to the Metropolitan and to other companies in the city of New York also applied to companies in Westchester county and elsewhere in the State?

A. Yes, sir.

By Mr. PLATT:

Q. In making the assessment of the special franchises of the Consolidated Gas Company, did the board place separate valuations on the special franchises and on its tangible property included in the special franchises?

Objected to upon the ground that the tangible property is a part of the special franchises and the question implies that it is not a part of the special franchises; objection withdrawn.

A. No, sir; they were found together.

Q. Do you make the same answer to a similar question with respect to the valuation of the tangible property of the various other companies whose certiorari proceedings are now before the referee?

Objected to as too general, immaterial and irrelevant; objection withdrawn.

A. Yes, sir.

Q. The Consolidated Gas Company had several special franchises, as reported in this report; did the board, in assessing the

105 franchises of the Consolidated Gas Company, as shown by Schedule C of this return, fix and determine separately the value of each of those special franchises?

A. It did not.

Q. Did your board fix and determine separately the valuation of the special franchise which the Consolidated Gas Company derived from the New York Gas Light Company?

A. No, sir.

Q. Nor the special franchise which it derived from the Harlem Gas Light Company, or any other of the constituent companies?

A. No one of the six companies; they were found all together.

Q. Where in your previous testimony as to the Metropolitan Street Railway Company you said you made one assessment to cover all franchises of one company, did you mean by that to say you made one valuation of all the special franchises together and no separate valuation of each separate special franchise?

A. That was my intent.

Q. In all of the cases where there are the proceedings before the referee, where there was one company having several separate special franchises, you valued all of these franchises together in one valuation and made one assessment?

A. Yes; where the parent company had merged into the constituent companies and there was the annual report of the gross earnings.

Q. When you say the "parent company" you mean the company which had, by consolidation or by lease, received the franchises of previous companies?

A. That is my meaning.

By Mr. BROWN:

Q. Where you use the term "merged" you include franchises that were owned by lease or by contract?

A. Yes.

106 By Mr. PLATT:

Q. I understand from your previous testimony that, in assessing the special franchises of the different companies, you valued these special franchises according to the earnings of the company?

A. That was one of the elements taken into consideration; yes, sir; and one of the principal elements.

Q. If the earnings of the company were larger then the valuations were made larger, and if they were smaller the valuation was made smaller?

A. I think I may answer yes to that proposition.

Q. In valuing the special franchises, then, you valued them according to the extent of the use that was made of them?

A. We placed valuations upon special franchises which were not in use, if that is an answer.

Q. In some cases?

A. In some cases; yes, sir.

Q. In these cases that are now before the referee on these certiorari proceedings you valued them, to some extent at least, according to the extent of the use that was made of the franchises?

A. Yes, sir.

It is stipulated that all the testimony given by the witness at this hearing as to the method of ascertaining the value of the special franchises is deemed to be given in all the cases pending before the referee, so far as it is applicable.

Q. Do you not now consider that the earnings of the company were derived from the use of all the property, franchises, rights, contracts and good will of the company?

A. I do.

Q. And from its good will?

A. Yes, sir.

107 Q. Included in the property of the Consolidated Gas Company was real estate not connected with the special franchises, consisting of gas-houses and other real property in use in the business of the company, as shown by Schedule K of the report; was not some portion of the earnings derived from the use of that property?

A. Yes, sir.

Q. Do you know of any way to estimate what part of the company's earnings were derived from that real estate separate from its other property and rights?

A. I know of no rule.

Q. You understand also that the company had a franchise to make gas in its gas-houses and sell gas in public and private places in the city of New York; was not some portion of the earnings of the company derived from the use of that franchise?

A. From the exercise of the right to be a corporation.

Q. From the exercise of the right now I refer to the right to make and sell gas?

A. Yes.

Q. Do you know of any way to estimate what part of the company's earnings were derived from that franchise to make and sell gas as separate from its other property and franchises?

A. I know of no such rule; no, sir; nor way.

Q. The company, also, it appears by Schedule K of the report, had 103,867 services into houses and buildings in New York and the contracts by which gas was delivered in those; those constituted a part of the property and assets of the company; was not some portion of the earnings derived from those rights in private houses; I intend now to refer to the contracts with private individuals which the company had, under which the individuals took gas and which constituted an asset of the company, and the question I ask you is whether the company did not derive some part of its earnings from that property, consisting of those contracts and rights, in private houses?

A. Undoubtedly so.

108 Q. Do you know of any way by which it can be estimated what part of the company's earnings were derived from those contracts as separate from the other property and rights of the company?

A. I know of no definite rule.

Q. The company also had a franchise to be a corporation and to do business as a gas company; was not the use of that franchise of some value to it in making its earnings?

A. Yes.

Q. Do you know of any way by which it could be estimated what part of the company's earnings were derived from the use of that franchise as separate from its other property and rights?

A. No exact rule; no, sir.

Q. The good will of the company was also one of its assets from which it derived part of its earnings; do you know of any way by which you could estimate the part of the company's earnings which were derived from its good will as separate from all its other property and rights?

A. Not definitely; no, sir.

Q. How many distinct assessments of special franchises did your board make for the year 1899?

A. About 5,000.

Q. What part of the year did it take to make those assessments?

A. It took most of the year; from April to October.

Q. These assessments were against individuals as well as against corporations?

A. Some few of them.

Q. In your former examination in the Metropolitan Railroad Company case you stated the board took into consideration in arriving at the value of its special franchises, as an appreciating factor, the entire value of the corporate assets of the company; did you, in arriving at the valuation of the special franchises of the Consolidated Gas Company, and the other companies that are now here in
109 these proceedings before this referee, take into consideration all the corporate assets of those various companies?

A. We did.

Q. Schedule D of the Consolidated Gas Company return shows that it had stock and bonds of other companies to the value of $5,574,438, and that this was the stock of the Mutual Gas Light Company of New York, a gas-light corporation which was doing business in New York city; I want to ask you whether the Mutual Gas Light Company is not one of the companies whose special franchise your board assessed separately?

A. Yes; that is my recollection, that it was separately assessed.

Q. Is it not true that your consideration of the large market value of Consolidated Gas Company stock and of its earnings enhanced the valuation of its special franchises?

A. Yes; I think they were deemed more valuable because of that.

Q. I want to ask you whether you make the same answer to a similar question with respect to the various other companies whose proceedings are here before the referee?

A. I do.

Q. I want to call your attention, for the purpose of identification,

to a statement which appears in the return which the board made to the certiorari proceedings in the Consolidated Gas Company case; in that return you state that, "among other things, respondent ascertained that the relator had heretofore claimed the value of its franchises to be upward of $7,000,000;" I would like to have you identify where that statement was made?

A. That was made to the New York city department of taxation and assessments.

Q. In one of the reports which the Consolidated Gas Company made?

A. Yes, sir.

Q. Did you find that the relator had anywhere in that re-
110 port, or at any time stated that the value of its special franchises as defined in this act was upward of $7,000,000?

A. No; didn't have reference to the special franchises.

Mr. FIERO: All this evidence is taken subject to the objection made to the evidence of Mr. Priest on the former hearing to questions of like character, and with the same ruling and exceptions.

By Mr. DYKEMAN (in the Coney Island & Brooklyn Railroad Co. case):

Q. In valuing the special franchises of the Coney Island and Brooklyn Railroad Company, did the board take into consideration that it had continuous lines of street railway from Park row, Manhattan, to the Williamsburgh ferries at Broadway and Grand street, and of Hamilton and Fulton ferry?

A. I think so; if such was the fact we did.

Q. That was the fact?

A. Then it was so considered.

Q. Did the board determine the special franchises of the Coney Island and Brooklyn Railroad Company to be more valuable by reason of those continuous lines to those several termini?

A. If it increased the earnings, yes.

Q. If it made the earnings more, I presume?

A. Yes.

Q. In effect you did consider these lines to those termini as making earnings?

A. Yes, sir.

Q. Did the board determine the gross and net earnings of the Coney Island and Brooklyn Railroad Company to be a fair measure of the value of the special franchises?

A. Well, as I have previously stated, it was considered as one of the elements, one of the principal elements; I am not prepared here to state it was the only element entering into consideration.

111 Q. You wouldn't vary your testimony in the case of this railroad from the answer made in the case of other railroads?

A. No, because I have no distinct recollection.

Q. Given the same consideration and same weight and effect.

A. I should assume so.

Q. The State Board of Tax Commissioners separately valued and assessed the special franchises of the Brooklyn City and Newtown Railroad Company at $819,000; did it not?

A. If they were separately reported, yes.

Q. You did make a separate assessment at $819,000?

A. I don't recall the figures now.

Mr. DYKEMAN: The special franchises of the Brooklyn City and Newtown were assessed at $819,000.

Q. That was reported to you as leased to the Coney Island and Brooklyn Railroad Company, was it not?

A. I am not clear in my recollection upon that; I haven't looked it up; I have had nothing to refresh my memory.

Q. In considering the gross and net earnings as a measuse of value of special franchises, was any attempt made to divide earnings and apportion one to the lessor system and the other to the lessee system in the case of the Coney Island and Brooklyn Railroad Company where the gross earnings were reported to you as being made by both systems?

A. Will you allow me a moment to refresh my memory?

Q. Surely?

A. (After conference.) We did separate the earnings of the two companies.

Q. Did you know that the two companies were operated as one system?

A. I think we did.

112 Q. And no division was made in the report?

A. No; we made the division.

Q. You apportioned one and set apart one portion of the net earnings to one company and the other portion to the other company?

A. That is true.

Q. Was the greater portion put down to the lessor or the lessee?

A. I can't remember the exact proportion now.

Q. Can you remember whether the one or the other was greater?

A. I cannot at present; in making this valuation an apportionment was made from the gross earnings of the larger company to these other companies because they were reported in bulk in the one report in the one company.

By the REFEREE:

Q. Were they assessed in bulk?

A. No; the companies he now refers to were separately assessed.

Q. Your assessment shows that?

A. Yes, sir.

By Mr. DYKEMAN:

Q. Was any portion of the earnings apportioned to that part of the Coney Island and Brooklyn Railroad Company between Prospect

park and Coney island which you have not valued and assessed as a special franchise?

A. I don't recollect.

Q. Did you take the whole portion of the gross earnings which you set apart to the Coney Island and Brooklyn Railroad Company into consideration when you valued its special franchise?

A. Is that the road about 12 miles in length to which you now have reference and a portion of it you claimed was in turnpike?

113 Q. Yes, sir; that is the road?

A. No; we held that to be private right-of-way and put a valuation, I think, upon only some six miles of it; I am not clear as to the exact proportion, but I think it was about one-half of it.

Q. These portions of the gross earnings in the division made by you were considered the fair measure of the value of the special franchise?

A. They were considered as a guide, as an element, as a factor, certainly.

Q. And as the most important factor?

A. As one of the most important.

Q. Can you give the method by which you made the division between the lessor and lessee system?

A. No, I cannot in detail; it is my recollection that we assumed a certain per cent. for operation of that mileage, but as to the exact details I am unable to state them.

Q. Did you divide them according to the respective mileages or respective length of road?

A. I am unable to state the details at this time.

Mr. FIERO: The same objection and exception to this evidence is made as in the Metropolitan case.

By Mr. DYKEMAN:

Q. In the case of the Brooklyn Union Gas Company did you separately value the special franchises which the Brooklyn Union Gas Company purchased from the Williamsburgh, Brooklyn, Metropolitan, Citizens', People's, Nassau and the Fulton Municipal Gas Companies?

A. To the best of my recollection we did not so separately make the valuations.

Q. Made one assessment over all these special franchises?

A. That is my recollection.

(Brooklyn Heights Railroad Company, pp. 29, 30.)

114 By Mr. COLLIN:

Q. Do you remember the Brooklyn Heights Railroad Company was lessor and operated the railroads of several other railroad companies?

A. I do.

Q. What have you stated in answer to the questions of Mr. Dykeman with reference to the apportioning of the gross earnings between lessor and lessee companies was true also of this system of companies, was it not?

A. I think so.

Q. And also what you testified to in relation to the termini and the value on account of the continuous lines was true as to this system of companies?

A. That would be true.

Q. Do you remember the Brooklyn, Queens County and Suburban Railroad Company was operated by the Brooklyn Heights Railroad Company, as lessor and lessee; do you remember the method by which you apportioned the gross earnings from the operation by the lessee between the two companies, in making your estimate of the gross earnings of each company?

A. I do not remember.

Q. Is that true of all those lessor and lessee companies in the Brooklyn rapid transit cases?

A. Yes, sir.

Hearing September 18, 1901.

GEORGE E. PRIEST, recalled:

Cross-examination (continued).

By the ATTORNEY-GENERAL:

Q. At page 140, line 15, the question is, "Q. Was a franchise valuable in proportion as it (the company) had agreed to pay the city a greater or lessor percentage of its receipts?"; your answer is, "Yes, sir;" is your answer complete?

115 A. No; I meant that within certain limits, if a company agreed to pay a large percentage of gross receipts on acquiring a special franchise it was regarded by us as some evidence that the special franchise was valuable; I say, within certain fixed limits, because I have in mind that the amount of percentage of gross receipts agreed to be paid, if in excess of a certain amount, would not, of course, leave the company enough to pay operating expenses.

Q. At page 141, line 12, the question is, "Q. The greater the sum agreed to be paid in the lease in such cases as that, the larger the assessment, which, in the judgment of the board, was placed upon the line covered by the lease? A. Yes, sir;" is that statement intended to exclude the fact that you considered other elements?

A. No.

Q. At page 136 you state that the final valuations were considered as of the value on January 7, 1900; is that date absolutely correct?

A. I find that the second Monday of January fell on the 8th of January, 1900, instead of the 7th.

Q. At page 146, line 14, question is asked, "Q. Didn't the fact

that after the lease it was operated by the Metropolitan Street Railway Company add, in the judgment of the board, to the value of that special franchise? A. Yes, sir; I think it did;" was it the fact of operation by the Metropolitan Street Railway Company, as such, or the fact that it became a part of a system, which was considered as adding to its value?

A. Yes, sir; the fact that it became a part of a successfully operated system.

Q. At page 279 question is asked, "Q. Where you used the term 'merge' you include franchises that were owned by lease or contract? A. Yes, sir;" did you mean by that answer to say that you assessed franchises held by a corporation under a lease or by contract to the corporation holding the property under such lease or contract, or is it to be confined to those cases where the cor-
116 porations have actually become merged into a single corporation?

A. We assessed special franchises to the corporations by which they were owned without regard to whether they were leased to or under contract with other corporations; we so assessed them whenever we had sufficient facts to do so, and I think that is true with regard to the entire Metropolitan system, so-called; we assessed the franchises to the corporations by which they were owned at that date; my recollection is that that is true with regard to all of the companies whose assessment is in litigation before this referee at this time; this statement does not refer to certain corporations erroneously assessed to the Edison Electric Illuminating Company, the facts in regard to which appear in the Edison case.

Q. At page 279, line 11, question is asked; "Q. If the earnings of the company were larger, then the valuations were made larger; and if they were smaller, the valuations were made smaller; A. I think I may answer yes to that proposition;" is that absolutely correct, independent of other considerations relating to the corporations under consideration in each particular case?

A. It is not a fact that the earnings of the company absolutely controlled; it was an important consideration, but not the sole consideration.

Q. Did you mention in your evidence as one of the elements considered in the assessment the cost of reproduction of the tangible property in the streets; what is the fact with regard to that being considered as an important element in making the assessments; I ask you this question in connection with your evidence at pages 138, 139, where you are asked with regard to the earning power and market value of stocks and bonds of the company as being two very important elements?

A. I should add to my answer relative to that matter at page 139 that we always considered the cost of reproduction of the tangible property in connection with the assessment.

117 Q. Have you caused an examination to be made as to the number of franchises owned by individuals assessed by your board for the year 1900?

A. Yes; and I find that it was about one hundred instead of several hundred.

Q. I call your attention to your statement that your board was engaged in the assessment of special franchises from April to October of that year; is it not a fact that work upon the assessment of special franchises was commenced immediately after the filing of the reports of the corporation about November 1, 1899?

A. Yes; we began our work very shortly after that and continued it, devoting our time to that matter, except as we were engaged in other official duties up to October 1, 1900; the major part of the eleven months intervening was spent in that work; there were 4,751 special franchise assessments to be made, and they were situated in nearly a thousand different tax districts through the State.

It is stipulated that all the testimony given by the witness, George E. Priest, as to the method of ascertaining the value of the special franchises, is deemed to be given in all the cases pending before the referee, so far as it is applicable.

Hearing, July 2, 1901.

Mr. PAGE: I offer in evidence an extract from the report of the State Board of Tax Commissioners for the year 1899, from the tenth page of the report:

"The following table of percentages, showing relation of assessed value to full actual value of 100; and equalization based thereon for the several counties was unanimously adopted."

Defendant's counsel objected on the following grounds:

First. It is incompetent, irrelevant and hearsay.

118 *Second.* It is not proper or competent evidence to show the percentage which real estate in the city of New York was assessed at in the year 1899. It gives simply the relative amount as to the other counties and not a percentage of the full value of the property in that city.

Third. It is not a judgment or decree, judicial decision or determination of any kind, and is incompetent as evidence of the facts set forth therein.

Fourth. It is a memorandum or table prepared by an official board for an entirely different purpose and having no connection with or relation to the present litigation, and is not binding upon the Board of Tax Commissioners either as a body or as individuals.

Fifth. It is not binding upon the people of the State of New York, who are the real parties in interest, this writ running against these defendants as quasi judicial officers; no previous act, decision or determination made by them in another or different proceeding or even in this proceeding is in any wise binding upon the people of the State.

Sixth. No memorandum, statement, report or decision by the State Board of Tax Commissioners or by the State board of equalization

as to the assumed percentage at which property in the city of New York is assessed is or can be binding as against the State of New York or its officers or against the people, the actual parties in this proceeding, so far as such statements assume to fix the percentage of full value at which property is assessed in the city of New York.

Seventh. The State board has no power of authority to determine as between different parcels of real estate in the city of New York other than special franchises as to whether any parcel or parcels is or are assessed at full value or less than full value, but has only authority under the statute to determine the ratio of percentage at which all property is assessed in the county as compared with
119 other counties, and that power solely for the purpose of equalization; the State board has not attempted to determine the valuation except as a whole for a single purpose.

Eighth. Since the proportion of the State tax to the total tax levy is only 7 per cent., the State board has no power or authority to determine the percentage at which any specific piece or pieces of property may be assessed as against other property in the city of New York, or to determine that all of said property other than special franchises is assessed at less than the full value for any purpose other than that of equalization between the different counties of the State.

Mr. PAGE: As I understand it, no objection is made to this report as not being a correct copy of the original report of which it purports to be a published copy.

Mr. COMAN: No, sir; but that portion from which you quote does not purport to give the action of the State Board of Tax Commissioners. It purports to give the action of the State board of equalization, and this is not a report of the State board of equalization.

Mr. PAGE: I take it it is not denied that the State Board of Tax Commissioners are *ex officio* members of the State board of equalization?

Mr. COMAN: No, sir; that is not denied. They are three members of that board, which consists of ten members.

The REFEREE: Does what you propose to read purport to give the percentage of assessment to real value in the city of New York?

Mr. PAGE: That is our view of it.

Mr. FIERO: That, I think, is one of the difficulties our friends will find. It is an assumed percentage of a hundred through the State, not an actual percentage, and it is the relation which New York bears to that assumed percentage of a hundred. Others have 67, 40, 70, etc.

120 The REFEREE: What they propose to show now is the percentage of the assessment in the city of New York to the real value of the city of New York. Of course, the percentage as to the value in other parts of the State can be of no sort of account.

Mr. FIERO: We say it does not show that or purport to show it.

The REFEREE: You ought to be able to agree on that fact, what the book does show.

Mr. COMAN: It simply shows they adopted these figures as the basis of their equalization.

Mr. FIERO: It shows a comparative value. Again, to call your honor's attention, see just what the State board does. The State board does not get at actual value.

The REFEREE: One hundred represents real value?

Mr. FIERO: Real value; but there is no question it is assessed at real value. That is the difficulty there is about it, and that is where the fallacy comes in regard to those figures. Then they say, assuming that 100 is the real value everywhere, compared with that assumed percentage of 100 New York is assessed at 67, but it is not a finding or determination or attempt to determine that value in New York at 100. The assessed value would be 67 per cent. of the actual value in New York city, but simply the assumed basis arrived at throughout the State and taken without any actual basis, but simply to arrive at the conclusion as to the different pieces of property, as your honor will see, because none of it is fixed at a hundred, but it ranges anywhere from 25 up to 80, and is purely for the purpose of comparison, and that brings up the main question, that all that this is is simply for the purpose of comparison. It don't undertake to show at all the actual assessment in New York city of 67 per cent. of the real value; it can't possibly do that, because there isn't any real value assessed throughout the State; there isn't a place in the State where it is assessed at a hundred.

121 The REFEREE: Suppose this was confined to the city of New York alone; eliminate everything else, and they assume the real value to be a hundred and they say the assessment is 60 per cent. of that. Don't they mean to determine by that that the assessment is 40 per cent. below the real value?

Mr. FIERO: Under such and such years that would be precisely what it would mean.

The REFEREE: If it don't mean that what does it mean; what can it mean?

Mr. FIERO: It don't mean that, simply because it isn't taking New York alone; it is taking New York in comparison with an assumed valuation of a hundred cents throughout the State, which don't exist.

The REFEREE: One hundred, meaning the figure X.

Mr. FIERO: And it don't exist; it is the unknown quantity.

The REFEREE: In Kings county the assessment may be 20 per cent. below real value; in Herkimer county it may be 40 per cent. below; wouldn't that be 40 per cent. below real value, no matter what you assumed, a hundred or X or Y or any other thing?

Mr. FIERO: I take it not; I take it the X remains all the while an unknown quantity; it isn't the 100 which is arrived at as the actual value in New York city.

The REFEREE: X is an unknown quantity and the 40 per cent. difference is a known quantity.

Mr. FIERO: You can't get at it by taking the known quantity

and deducting it from the unknown. Sixty-seven per cent. doesn't mean sixty-seven per cent. of actual value.

The REFEREE: Isn't this whole operation, then, all imaginary—the whole work?

122 Mr. FIERO: It is imaginary so far as real values are concerned. It is only useful as giving comparative values between different counties, and the sole object of it is—and that is another branch—the sole object is to equalize as between the county of Albany and county of Herkimer and county of New York, and assuming Albany at 80 per cent., Herkimer at 80, if you please, Erie at 70, New York at 67, and then arrive at the fact that the relation of those properties to each other is upon an assumed basis of 100 per cent.; that of 67, 80, etc., but not to get at the actual value. That needs another suggestion in reference to it, and is this: That for any other purpose this board has not got any power or authority. The suggestion is made here, and it is a matter of which your honor will take judicial notice, that only 7 per cent. of the tax which is collected is a State tax; the remainder is a tax in the city of New York and a local assessment. Now, these men have no right, no power, no authority, to fix the assessment down in New York and say 67 per cent. of the real value so as to govern or control the people in New York or affect them in any way. It is entirely outside of their jurisdiction; outside of their power; outside of their authority. Moreover, still another suggestion along that same line: These men are not delegated with power or authority to represent the State, except for the single purpose of equalization. While, as a matter of form, this board is the party defendant, the fact they in another proceeding, in connection with seven other men, fixed a valuation, is not any evidence against the State any more than a finding of fact in one litigation by a court could be offered in evidence in another litigation as between different parties where another litigation was in progress and for an entirely different purpose. In other words, this Board of Tax Commissioners simply represent the State to the effect that they are the judicial officers who have determined this question in a matter which came before them in an entirely different way and for an entirely different purpose. The fact that they have said—assuming now for

123 the purpose of the argument that they have fixed this percentage absolutely in New York at 67 per cent. is not binding upon the people of the State in any subsequent proceeding or in this proceeding. It does not follow that now the assessment in New York is 67 per cent. of full value. Your honor's attention ought to be called a little more to the purpose for which the evidence is offered that we are discussing. Of course, the commissioners have returned that they have assessed at full value of 100 per cent. The purpose of this evidence is to show that other property—that all property in New York is only assessed at 67 per cent. of its value, and when you come to the equalization, of course, that includes this property also. Taking this property together with other property, the commissioners have decided it is only assessed at 67 per cent., so that

other property is not assessed at 67, but other property is assessed at such a figure that in with all of this property which is assessed at full value in all these special franchises three men have determined that the whole property of the city is only assessed at 67 per cent. of its value. So that we insist that the evidence is not competent, because the State Board of Tax Commissioners, acting as members of the board of equalization, had no right, authority or power to bind the State. That it is not competent evidence for any purpose whatever. That they determined this 67 per cent. for the purpose of equalization as what New York ought to be valued at. Of course, if they were not parties to the record I do not suppose your honor would have a moment's hesitation about it. You would say at once, if this were an action in which The Metropolitan Railroad was plaintiff on the one part and The State of New York was the defendant, and the Metropolitan Railway came in as it does now and said, "We offer to show that heretofore the State Board of Tax Commissioners, who are State officers, have determined and fixed a fact for another purpose," it wouldn't be such a determination as your honor would allow for a moment, but I say that because these
124 commissioners are parties to the record does not change it, because they are simply parties for the purpose of making their return; they are not the real parties in interest.

Mr. COMAN: They didn't fix this valuation.

Mr. FIERO: It was the State board of equalization; three of the members, only, out of ten that fixed the valuation.

The REFEREE: Of course, I am not sure but what you may be right, but these admissions, or whatever you call them, this determination, is not binding. The only question before me is whether it is evidence. It don't bind the State. Take admissions by administrators in an action against them; admissions by commissioners of highways; while their admissions might not bind the town, but in a proceeding against them to which they were a party are not admissions by all public officers; some evidence against them in the proceeding not binding on the State or county or town or on the estate where admissions are made by executors and administrators. The question is now, in my mind, while not binding, while it is open to explanation, open to proof of the truth; if this is not true, the question is whether it is not some evidence against these defendants in this proceeding.

Mr. COMAN: May I make a suggestion right there?

The REFEREE: Yes.

Mr. COMAN: Does not your honor in making that suggestion lose sight of the fact that this admission, if it was an admission, was not made by any party to this action, but by the State board of equalization, who are not parties to this action at all.

The REFEREE: These parties are members of that board and joined in making this statement?

Mr. BROWN: It is a table they prepared, adopted by the State board of equalization. It is their table.

125 The REFEREE: It seems to me that it is a pertinent fact, of course, here to show that while this property is confessedly assessed according to this return at its full value, that other property in the city of New York generally is assessed at less than its full value, so that there is injustice, relatively. The only question is whether you can get at it in this way. If this report of these men means anything, if it is a report to be relied upon, if it has any significance, it seems to me that it means that in the city of New York whatever the real value may be, the general assessment was 33 per cent. below that value. If it has any meaning, it means that. If it does not mean that, I don't see that it is of any account whatever.

Mr. FIERO: We say it is not for this purpose.

The REFEREE: No matter what the purpose was. The purpose was to ascertain and determine what the assessment was, what the value of the assessment was as compared with the real value. That was the very thing that they were to find out. They were to equalize the assessed value with the real value as far as they could.

Mr. FIERO: That is where I tried to show your honor your view was in error. It is not an attempt to show the assessment of New York as compared with the real value, but to show how New York is assessed, at what percentage as compared with other localities. There never was an attempt and no reason for any attempt to show what the actual proportion is in New York to a hundred per cent. actual value, but for the purpose of making an equality throughout the State, assuming that the State is assessed at 100, which it is not.

The REFEREE: Not assessed at a hundred, but assuming that the real value was a hundred.

Mr. FIERO: When you assume the real value is 100 you have no figures relating to assessment that bears that out. Just a

126 word in reference to admissions. I submit an admission by an administrator or executor stands upon a different ground because he represents the estate. But a public officer can not make an admission which is binding upon the State unless it is directly in the line of his duty and one of the things he is charged to do. These men were acting in that case in a quasi judicial capacity, and they made a determination there which they acted upon. Certain evidence was before them. It does not appear whether that determination was properly arrived at, and you cannot determine whether it was properly arrived at or not. You may take any case where there has been evidence given in regard to a matter. One side perhaps does not appear. That cannot be used subsequently when a determination comes up to say that court determined that question, and therefore it is evidence, unless it was a litigation between the same parties. That is the point upon which we stand, and it would be unjust to the city of New York. Ninety-three per cent. of the taxes go to the city of New York, and not to the State. What right has a State board under such circumstances as those to determine the percentage? I want to call your honor's attention to that fact.

Under the franchise law 93 per cent. of that assessment which is made is for the benefit of the city of New York, locally. Ninety-three per cent. of the taxes go to the city of New York, locally. This tax board has no right to fix or determine in any way the percentage, nor is it any evidence as against the city of New York.

The REFEREE: I agree with you they are not binding. I am not sure it is not some evidence, and I think the safer way is, as I am to take and report the evidence, to take this evidence. It will not take a great while to give it for what it is worth. I will hold for the present that it is some evidence, the weight to be given to it will be determined hereafter.

Defendant excepts.

127 Mr. PAGE: I continue to read from page 10, "New York percentage, 64 per cent." I now read the report of the State Board of Tax Commissioners, of which the statement from which I have previously read was a part. The following is the report, the statement being a part of it: "At a meeting of the State board of equalization, held at the office of the secretary of state, in the city of Albany, on the fifth day of September, 1899. Present—S. Fred Nixon, speaker; William J. Morgan, comptroller; John T. McDonough, secretary of state; John C. Davies, attorney-general; John P. Jaeckel, treasurer; Edward A. Bond, State engineer and surveyor; Martin Heermance, tax commissioner; George E. Priest, tax commissioner; J. Edgar Leaycraft, tax commissioner. Absent—Timothy L. Woodruff, lieutenant-governor. The following report was submitted."

The REFEREE (interrupting): Submitted by the said tax commissioner?

Mr. PAGE: Submitted by the State Board of Tax Commissioners.

Mr. COMAN: I object unless it appears in the record.

Mr. FIERO: Is it signed by the present commissioners?

Mr. PAGE: No; "Martin Heermance, George Priest, J. Edgar Leaycraft, State board of tax commissioners."

Mr. FIERO: We further object on the ground it does not appear it was the act of the present Board of Tax Commissioners.

Mr. PAGE: "The State Board of Tax Commissioners respectfully submit the following report: The total assessed value of real and personal property taxable locally for all purposes in the State of New York for the year 1898 shows a net gain over the assessment of 1897 of $177,785,805. The increase for the two years prior thereto

128 was $529,898,116, making an aggregate net increase for the three years last passed of $707,683,921. This, of course, does not include the large increase in the county of New York under the present assessment, which will not be officially reported until December of this year, and will be considered in the State equalization for 1900. During the present year we have visited officially the counties of Cattaraugus, Chenango, Clinton, Delaware, Dutchess, Essex, Franklin, Fulton, Greene, Hamilton, Kings, Lewis, Livingston, Monroe, Nassau, New York, Oneida, Otsego, Queens,

Rensselaer, Richmond, Rockland, Schenectady, Scholarie, Schuyler——"

The REFEREE (interrupting): How are these other counties important?

Mr. PAGE: Nothing, except I want to read the report in full.

The REFEREE: Go on.

Mr. PAGE: "Steuben, Sullivan, Ulster, Warren and Washington. In all of these counties we have inquired as closely as possible into the methods of assessment, in each instance examining witnesses under oath and using every means available in procuring evidence upon which to base a table of equalization. Committees appointed by boards of supervisors have appeared before us and presented arguments, both oral and written, on behalf of their respective counties. We submit herewith a digest of the evidence upon which this board has prepared the following list of percentages and table of equalization based thereon. All of which is respectfully submitted. Martin Heermance, J. Edgar Leaycraft, Geo. E. Priest, State board of tax commissioners." This report was presented at the meeting of the State board of equalization on the 5th day of September, 1899.

Mr. FIERO: We object to that on the ground that it was before the franchise tax went into effect and has no relation to or connection with the present assessment, and move to strike it out on that ground.

129 Mr. BROWN: It is within twenty-five days of the time the law took effect and is some evidence of the relation the percentage value bears to the actual value.

The REFEREE: That was the last preceding assessment.

Mr. FIERO: And not the assessment now being litigated.

The REFEREE: The last preceding assessment before the one now in question?

Mr. FIERO: This point in regard to that, of course, the assessment advanced, and as your honor will see just there by the reading of that report, that there was a large increase in New York city, a large raise in New York city, so that the percentage was different from other years, so that this percentage ought not to be allowed in evidence.

The REFEREE: It ought to be confined to the year we are now interested in; you have got that, have you?

Mr. PAGE: I have that and I am now coming to it. Our point still is, this year's proceedings which I have just read is some evidence on this question now before the court; I now, however——

The REFEREE: I don't see the relevancy of any inquiry into the comparative values of any year except the year we are now concerned with. You see, these assessments and the basis upon which they are made, as I know all through the country, differ from year to year, while they are always below the real value, yet the percentage differs from year to year, so that I don't see that it would be a very valuable guide to take the assessment for any year except the one in question.

Mr. PAGE: As I understand it, the point last made, and on which

the motion to strike out has just been made, is that this re-
130 port which I have read is a report by a board a year prior to the year in which the transactions took place which are now the subject of review by these certiorari proceedings.

The REFEREE: That is as I understand it.

Mr. FIERO: It is the equalization of the assessment for the year previous, although not made until the next August; the fact being the assessment is made the year before and then the equalization is made the next year.

The REFEREE: See if I understand it. There has been an assessment in the city of New York since this one?

Mr. FIERO: Yes, sir.

The REFEREE: It is that assessment we are inquiring into now?

Mr. FIERO: Yes; and there was a subsequent equalization of that assessment.

The REFEREE: We ought to be confined to that.

Mr. BROWN: Suppose we should show from the beginning of the State right down the Tax Commissioners of this State—the real estate in the State of New York has never been assessed at its full value?

The REFEREE: Assuming that is so, but when you come down to the percentage they vary from year to year.

Mr. BROWN: If they will concede a fact which Mr. Fiero has stated in the way of assumption, that real estate in the city of New York is never assessed at full value—they have returned here as a fact that they have assessed these franchises at their full and actual value. Certainly in that connection it is important for us to show—and they are assessed as real estate—that real estate in the State of New York never has been assessed at its full and actual value, and we are aggrieved when we are put on a basis of full value.

131 The REFEREE: I suppose that is true of every county in the line.

Mr. BROWN: If they will concede it, all right.

Mr. FIERO: What difference would that make, if, in the year 1900, it was assessed at the full value?

Mr. BROWN: As we are going to put 1900 in it becomes material to show not only that that year we are assessed at full value, while all other real estate in the city of New York is assessed at 67 per cent., but never in the history of the State has real estate been assessed at its full value.

The REFEREE: If you show it is not assessed at its full value in 1899, if that be the same, that accomplishes your whole purpose. This admission it is never assessed at i-s full value is of no account.

Mr. BROWN: I make this suggestion in view of the motion to strike out.

The REFEREE: I hold it must be confined to the assessment in question.

Mr. BROWN: Does your honor strike it out?

The REFEREE: Yes.

Mr. BROWN: We take an exception to that ruling.

Mr. PAGE: I now read from the annual report of the State Board of Tax Commissioners of the State of New York.

Mr. COMAN: To that we make the same objection as before, to the last offer.

Mr. PAGE: With the exception that this is a copy of the official report.

Mr. COMAN: We didn't make any objection on that ground.

Objection overruled; exception.

132 Mr. PAGE: I read from page 27, as follows: "To the State board of equalization," as herein set forth, which is dated Albany, September 4, 1900, and which is signed by George E. Priest, J. Edgar Leayeraft, Lester F. Stearns, State board of tax commissioners. I read extracts from the same as far as they bear on this proceeding: "The special franchise valuations, upon property in public streets and places, appear for the first time upon the local assessment-rolls of 1900, for all the purposes of local taxation." "During the present year official visitations have been made to the following counties: Albany, Alleghany, Broome, Cayuga, Chautauqua, Chemung, Columbia, Cortland, Erie, Genesee, Herkimer, Jefferson, Madison, Montgomery, Niagara, Onondaga, Ontario, Orange, Orleans, Oswego, Putnam, Saratoga, Seneca, St. Lawrence, Tioga, Tompkins, Wayne, Westchester, Wyoming, Yates. In each of these counties the attendance of the assessors and supervisors has been uniformly large and the sessions mutually instructive and beneficial. We have, as thoroughly as time permitted, searched into the methods of assessment, in each instance examining the witnesses under oath; have inquired into sales and their character as compared with assessments preceding and following such sales; have personally examined some of the property treated on the rolls in many cities and county seats, and have sought by every means open to us to obtain information available for the preparation of the table of equalization which we herewith present." "We herewith furnish the assembled data upon which we have formulated the list of percentages accorded to the counties, and the proposed table of equalization." I now read from the table of equalization annexed to the foregoing report, which appears at page 29 of the printed report: "The following table of percentages, showing relation of assessed value to full actual value of 100, and equalization based thereon for the several counties was unanimously adopted: * * * New York, percentage, 67."

133 Mr. COMAN: If your honor please, it appears from the report just read that the commissioners did not visit the city of New York during the year 1900. I move to strike out the evidence upon that ground as well as upon all the grounds stated in the objection to its reception.

Motion denied; exception.

Mr. PAGE: If your honor please, we think, in view of the point just made, we are entitled to have the extracts from the report of the preceding year stand, in that it specifically appears in that year they did visit the city of New York.

Mr. FIERO: They give a different result.

The REFEREE: I don't see that is very important. You have got their statement they made of the examination they thought was necessary, probably.

Report for 1900 marked for identification, "J. M. R., July 2, 1901."

Mr. PAGE: I now read from the report contained in the same document made to the legislature by the State Board of Tax Commissioners, the board now in office, dated January 25, 1901. The portion which I now read is as follows, at page 20:

Mr. COMAN: The same objection as previously made, and exception.

The REFEREE: Same ruling.

Mr. PAGE: "Two important variations desirable. As material amendments we urgently recommend, as of paramount importance, the following:"

Mr. FIERO: The additional objection that this is not a statement of a fact, but a simple statement of opinion.

The REFEREE: I don't know what it is, of course. I don't see just now how a recommendation made by them is a matter of evi-
dence.

134 Mr. HILL: Recommendation bearing upon what they had done; that is what it is.

The REFEREE: He can read it and we will see what it is.

Mr. PAGE: I will read it, subject to your honor's ruling afterward: "*Second.* The law should authorize and direct this board to equalize, after hearings, special franchise valuations found by it to conform with the local assessment of other real estate in the tax district where special franchises exist, upon such proofs and information as the board can obtain. Such authorization will afford the warrant of law for supplying a remedy in the first instance to corporations. The corporations are now compelled in every case, involving great or small amounts, to resort to a court proceeding for a reduction which this department may be willing to admit is equitable; but is not by the law, in its present reading, permitted to make." We offer this in evidence as proof of the fact.

The REFEREE: Of what fact?

Mr. PAGE: That in this case there has been an inequality in the valuation or in the assessment of the various relator company franchises in that it is assessed at full, actual value, whereas real property elsewhere through the State, and particularly in the county of New York——

The REFEREE (interrupting): They admit in their report it was assessed at full value.

Mr. PAGE: This proof may be cumulative, but we offer it as a part of the line of proof we have previously given.

The REFEREE: Their return is conclusive on that fact, that they have assessed it at its full value. You have got two facts now before me; one is they have assessed at full value; that is conclusive; that binds everybody in this proceeding. They have assessed it
135 at its full value. Now you have the other fact so far as this tends to prove it, that other property was assessed at less than its full value.

Mr. BROWN: Isn't this an admission on that very point? Isn't it inferentially an admission that other property is assessed at less than its full value, other real estate, otherwise there would be no basis for their recommendation?

The REFEREE: Yes.

Mr. BROWN: In that view it is admissible.

The REFEREE: As I understand it, my report goes before Judge Herrick, and if I have admitted any evidence that is not competent you can argue that question there and he can disregard it. Is not that so?

Mr. FIERO: After your honor has passed upon the facts with the evidence in that is the limitation upon that.

The REFEREE: He can strike it out, and if the balance of the evidence, the evidence remaining does not justify my conclusions, he will reverse my conclusions, but if I shut out evidence that it competent, and he should hold it to be competent, then he would have to send it back to a referee to get that evidence, so that in all cases of doubt, of course, it is a good deal safer to let evidence in. I do not regard this evidence as very important to these parties. They have got the proof in for all that it is worth, and this would be just cumulative. Another admission of the same men. I think we had better shut this out. You have got the admission of these men in; it won't fortify it much by putting it in again; make it no stronger. I don't think it adds any strength to it, so I think the safer way is to leave it out. It is only by inference and implication they make an admission here. I hold the admissions of these men are competent, and I have received them, but I do not think this evidence is important.

Plaintiff excepts.

136 (NOTE.—The following testimony of Mr. Hobbs was taken for all cases on August 2, 1901, and is a part of the record in this case, according to stipulation.)

Hearing August 2, 1901.

FREDERICK G. HOBBS, sworn in behalf of all the plaintiffs, testified:

Examined by Mr. PAGE:

Q. Will you please state your occupation?
A. Real estate broker.
Q. Where do you do business?
A. No. 284 Columbus avenue, New York city.
Q. How long have you been in business there?
A. About twelve years.
Q. Does your firm do a general selling business in real estate throughout the city?
A. Yes, sir.

Q. Have you made sales during the year 1900 of real estate personally?

A. Yes, sir.

Q. Have you examined the assessment-rolls in the city of New York for that year for the purpose of comparing the assessed values of the property which you have sold with the prices at which such property was sold?

A. I have.

Q. In your opinion, did the assessed value of such property equal, exceed or fall short of the actual value of the same?

Objected to upon the ground it is incompetent and that the testimony should be confined to specific pieces of property. And the witness should state facts.

(The REFEREE:)

Q. Have you in mind any particular case, Mr. Hobbs?

A. Yes, sir.

Mr. PAGE: I submit we are entitled to an answer to the original question, he having been, in our opinion, properly qualified as an expert.

137 The REFEREE: I will allow him to state that in the case of sales made by him and comparing the prices obtained with the assessments upon the same property, that in all cases the assessed values were less than the sale values.

Defendant excepts.

By Mr. PAGE:

Q. In the cases of property which have been sold by you during the year 1900, was the selling price in excess of the assessed value of the pieces of property?

Objected to on the ground it is incompetent and not the proper method to prove the fact sought to be proved. That the witness must give the value of the particular piece of property as assessed, and the sales value or actual value. That this question calls for a conclusion and not for a fact, and is incompetent.

Mr. PAGE: I desire to restate my question precisely in accordance with the statement which has been made by Judge Fiero, as follows: Have you prepared a list of the parcels of property which you sold during the year 1900, the amount of the assessed value of the same during that year and the percentage of actual value to assessed value in the several cases?

A. Yes, sir.

Q. Will you produce such a list; I now refer to the year 1900?

A. Yes, sir (producing same).

Q. Are these percentages which you have calculated correct?

A. They are.

Q. Are the tables which you have given of the selling prices correct, and of the assessed values?

A. Yes, sir.

The following tabulations were then offered in evidence:

138

Year.	Location of property.	Actual value.	Assessed value.	Assessed value equal to per cent. of actual value.
1900.				
Jan. 10	149 Riverside drive, to A. G. Loomis	$73,500	$40,000	54.421
Jan. 22	321 W. 106th St., to Chas. Osborn	35,500	18,000	50.704
Jan. 22	1228 Madison Ave., to S. & S.	16,000	11,000	68.750
Jan. 29	S. E. cor. B'way and 92d St., 161.3 x 108 x 117	199,000	90,000	45.226
Jan. 29	1772 Amsterdam Ave., to Martha B. Moshier	33,000	17,000	51.515
Jan. 30	1228 Madison Ave., to Frank Wise	15,750	11,000	69.841
Feb. 1	125 W. 77th St., J. Wallace Morrell	41,000	20,000	48.780
Feb. 16	2726 B'way, James F. McGarry	30,000	12,000	40.
Feb. 13	13 lots, 101st St., West End Ave. to B'way (125 x 100.11 inside 5 lots, $30,000; N. W. cor. B'way, 101st St., 96.7 x 100, $39,500; N. E. cor. West End Ave., 101st St., 100.11 x 100, $40,500)	225,000	110,000	48.888
Feb. 21	169 W. 76th St.	26,000	13,000	59.230
Mar. 1	Two lots, north side 86th St., 160 ft. east of Riverside drive	42,000	24,000	57.142
Mar. 26	9 East 76th St., John N. Golding	73,750	40,000	54.237
Apr. 4	22 W. 87th St., Patrick Moore	37,000	22,500	60.810
Apr. 10	10 W. 76th St., Frederick H. Parks (1900, 35,000 p.)	77,500 (1901)	43,000	55.483
Apr. 11	B'way, east side, 108 ft. south 92d St., 53 x 102 (July 28, 1900) auction, $57,750	56,000	42,000	75.
Apr. 25	323 W. 86th St., A. B. Knight to Wm. H. Hulick, 18.6	32,250 (1901.)	25,000	77.519
June 1	160 W. 73d St., J. H. Armstrong	22,500	15,000	66.666
June 27	270 W. 93d St., Warden T. Rosen	22,000	15,000	68.181
June 28	614 W. 114th St., G. L. Slawson	16,000	10,000	62.500
July 10	524 West End Ave., Fannie M. Chapin, Waldron Williams	43,000	27,500	69.953
July 10	Lot south side 112th St., 250 ft. west 7th Ave., A. H. Brennan to Hallahan Ahern	10,750	5,000	46.611
Aug. 15	148 W. 70th St., J. P. Huggins to Dr. Embury	25,000	18,500	74.
Aug. 31	342, 344 W. 85th St., Edw. Kilpatrick to R. R. Stratton (17 ft.)	100,000	65,000	65.
Sept. 5	267 W. 71st St., John R. Thorp to Wm. T. Evans	22,100	13,500	61.086
Sept. 12	269 W. 71st St., Sarah C. Newman to Rodrigues	19,000	14,500	76.316
Sept. 13	274 W. 89th St., E. A. Becker to H. P. Penning	21,500	14,000	65.116
Oct. 22	36 W. 73d St., Ella L. Montalbo to Mr. Clark	45,000	24,000	53.333
Nov. 20	322 W. 80th St., Clarence True to E. B. Meyrowitz	38,000	24,000	83.157

Year.	Location of property.	Actual value.	Assessed value.	Assessed value equal to per cent. of actual value.
1900.				
Nov. 24	S. E. cor. B'way and 94th St., 83.3 x 146, A. Bruns to A. E. & M. E. Bingham	$120,000	$47,250	39.375
Nov. 24	Sale lots south side 94th St., 110 ft. west of West End Ave., 190 x 100.8½, F. M. Jencks to R. Axelrod	130,000	35,600	27.382
Dec. 5	Sale of 168 W. 73d St., for Mrs. Sanders to Wm. Stokesbury	17,750	15,000	84.507
Dec. 24	314 W. 105th St., Umberfield to B. R. Merwin (16000 p–1900).	39,250 (1900.)	20,000	50.955
		$1,705,100	$907,350	53.213

139 Mr. PAGE: I desire to state that there are twenty-nine sales here given and that the average percentage of assessed value to selling price was 53.213.

Q. Does this statement comprise all of the sales which you have made?

A. All the cash sales made during that year, exclusive of exchange.

Q. Were the prices which you obtained in all of those cases the best price which you could obtain for the property?

A. Yes, sir.

Q. Are you familiar generally with sales throughout the city of New York?

A. More particularly on the West Side.

Q. Are you familiar generally with real estate transactions throughout the city?

A. Yes, sir.

Cross-examination.

By Mr. COMAN:

Q. All of the sales which are indicated upon this statement which has been put in evidence are of property north of Seventieth street, or at Seventieth street, and further north?

A. Yes, sir.

Q. That is what you call the upper portion of the West Side?

A. Yes, sir.

Q. Is it a fact that values are quite rapidly increasing in that portion of the city?

A. They are advancing in some cases.

Q. As a rule?

A. As a rule, I think, they are advancing; there are exceptions.

Q. I understand you these are all the cash sales you made during the year 1900?

A. Yes, sir.

140 Q. By that you mean of actual sales?

A. Yes, sir.

Q. Not speaking of exchanges of property?

A. No, sir.

Q. Have you any statement of your sales during the period from June, 1899, to January, 1900?

A. Yes, sir.

Q. Have you it here?

A. Yes, sir.

Q. Will you produce it?

A. Yes, sir (producing same).

Q. In the cases of these sales upon the statement which has been put in evidence, were your sales accompanied by loans to the purchaser?

A. What do you mean, leaving a purchase money mortgage on the property?

Q. Or loans made for the purpose of erecting buildings?

A. The sale on April 11, I think, was made at $56,000; there was a building loan and afterward there was some trouble with it and afterward it was sold at cost July 28 for $57,750 and bought by an outsider.

Q. Are there any other cases of building loans there?

A. Yes, sir; there (indicating).

Q. In the sale of the southeast corner of Broadway and Ninety-fourth street the sale was for $120,000?

A. Yes, sir.

Q. How much was loaned?

A. I have forgotten.

Q. Could you tell approximately?

A. I have no recollection.

Q. The sale of November 24, lot southside of Ninety-fourth street west of West End avenue for $130,000, was also accomplished by a building loan?

A. Yes, sir.

Q. Do you remember how much that was?

A. No, sir.

141 Q. You couldn't tell approximately?

A. No, sir.

Q. Those are the only instances that you now recall?

A. Yes, sir.

Re-direct examination.

By Mr. PAGE:

Q. Referring to the tabulation, concerning which you have last testified, it contains a statement of sales for six months, beginning June, 1899, and extending to January 1, 1900, does it not?

A. Yes, sir.

Q. Is that a correct statement of sales which you have made and of the assessed values of those parcels of property?

A. Yes, sir.

Q. Are the computations connected with those correct as contained in that statement?

A. Yes, sir.

Plaintiff's counsel (Mr. Page) offered in evidence as further testimony on the part of this witness the tabulation of his sales and assessed values of the same property.

Year.	Location of property.	Actual value.	Assessed value.	Assessed value equal to per cent. of actual value.
1899.				
Jan. 10	S. W. cor. B'way & 115th St. 100.11 x 75, Melvena MacBride to W. L. Crow & Taylor (31,500—1900)...	$65,000	$27,000	41.538
Jan. 27	N. E. cor. B'way & 113th St., 50.11 x 100, S. & H., to Gunn and Grant	45,000	20,000	44.444
Jan. 28	25 W. 90th St., G. A. Fisher to E. M. Black, 1899—12,000 p.. (1900)	27,600	18,000	65.217
Jan. 31	256 W. 93d St., Emma Hopping to John Marshall	25,000	18,000	72.
Feb. 3	319 W. 80th St., Clarence C. True to Winchester Fitch	32,000	20,000	62.500
Feb. 7	546, 548, 550 W. 53d St., E. F. Hassey to Fred. Brakman, $18,000 each	54,000	33,000	61.111
Feb. 9	Two lots, south side 112th St., 200 ft. west of 7th Ave., M. Keppler to Hallahan Ahearn	21,500	10,000	46.511
Feb. 20	S. W. cor. Central park, west, & 71st St., 100.5 x 125	200,000	92,000	46.
Mar. 2	169 W. 76th St., Egan & Hallecy to Alice Newhouse.	25,000	18,000	72.
142				
Mar. 3	Three lots west side B'way, 25 ft. south 114th St., F. M. Jencks to Mrs. Clark	46,500	21,000	45.161
Mar. 8	S. W. cor. Boulevard & 112th St., J. L. O'Brien to J. W. White..	40,000	15,000	37.500
Mar. 13	Plot 80 x 100.5 north side 69th St., 265 ft. west of Amsterdam Ave., Egan & Hallecy to Henry Oppenheimer	30,000	20,500	68.333

Year.	Location of property.	Actual value.	Assessed value.	Assessed value equal to per cent. of actual value.
1899.				
Mar. 14	532 W. 114th St., E. S. Kennedy to Emma F. Hopping	$25,000 (1900)	$13,000	52.
Mar. 17	133 W. 80th St., Gertrude E. Shannon to J. Arthur Joseph	30,000	19,000	63.333
Mar. 22	Plot 50 x 100.8½ south side 93d St., 200 ft. west of Central park, west. Assessed in 1899 in one large plot, p'd $42,000			
Mar. 25	315 W. 76th St., A. Gweer to Wm. H. Park	33,750	21,000	62.222
Mar. 28	N. W. cor. B'way and 90th St., 50 x 100, F. M. Jencks to Egan & Hallecy	70,000	28,500	40.714
Mar. 29	Mary and Margaret McConville to Albert D. Oppenheim, 18 W. 87th St	31,000	22,000	70.967
Apr. 7	Plot 50 x 100 west side B'way, 50 ft. north 90th St. to Mrs. Clark	51,000	24,000	47.058
Apr. 12	103 W. 86th St., D. Willis James to Dr. Palmer	28,000	24,000	85.714
Apr. 13	119 W. 127th St., Mary E. Crawford to Ella W. Eddoes	10,750	8,000	74 418
Apr. 26	N. W. cor. B'way and 87th St., 100 x 150, J. M. Horton to Mrs Clark	130,000	64,500	49.616
May 5	308 W. 104th St., Ethel L. Benson to Shepard Knapp	23,000	15,500	67.391
May 27	N. E. cor. Amsterdam Av., 107th St., 50.7 x 100, Chas. Weisbecker to David Richey	41,500	17,000	40.963
June 1	7 W. 95th St., Peter Wagner to Fritz Hill	33,000	20,000	60.606
June 1	202 B'way, A. B. Brown *et al.* to O. F. Zollikoffer	300,000	275,000	91.666
June 16	320 W. 91st St., R. E. Dowling to J. J. Smith	45,000	25,000	55.555
July 3	258 W. 75th St., Alice C. C. Royce to Harry J. Crawford	22,000	8,500	38.636
July 10	S. W. cor. 2nd Ave., 72nd St., 102.2 x 59, Martin Metzger to Egan & Hallecy	49,000	14,000	28.571
July 21	37 W. 87th St., W. D. Starr to W. F. H. Armstrong	43,000	22,000	51.162
Aug. 16	315 W. 88th St., Jas. Carlew to Hattie Mendelson	43,000	21,000	48.837
Aug. 22	435 West End Ave., Metropolitan Improvement Co. to Mr. Quigg	27,000	18,000	66.666
Aug. 25	Riverside drive, house 20 x 89, S. & S. to Mr. Wiggins	47,500	32,000	57.368
Sept. 12	2070 Eighth Ave., N. E. cor. 112th St., A. McDowell to Leasenfeld	63,000 (1900)	30,000	47.619
Sept. 14	259 W. 90th St., Frame & Son to Otto Seyd	27,500	15,000	58.181
Sept. 27	151 Riverside drive, Hall to Murphy (1899, p. 23000)	73,500 (1900)	40,000	54.421

Year.	Location of property.	Actual value.	Assessed value.	Assessed value equal to per cent. of actual value.
1899.				
Sept. 27	302 W. 81th St., Marie E. Taylor to Fred Seggerman.	$31,300	$17,000	54.313
Sept. 28	20 W. 76th St., Jas. Carlew to Thos. Bassford (1899, 30000 p.)	70,000 (1900)	40,000	57.014
143				
Nov. 16	4 lots north side 84th St., 100 feet west West End Ave., Chas. Gahren to Henry Oppenheimer	50,000	36,500	73.
Nov. 28	2083 Eighth Ave., David Richey to Martha B. Moshier	34,000 (1900)	18,000	52.941
Dec. 29	Lots on Broadway, 26 ft. north 76th St. 80 x 134 x 102.2 x 25 x 25 x 89.6½, C. F. Hoffman to Manhattan Congregational church.....	80,000	51,000	63.75
		$2,124,100	$1,253,000	58.984

Q. Your testimony is the same for the six months prior to the six months I have previously mentioned, beginning January 1 and extending to July 1, 1899; sales by you and assessed values and computations are correct?

A. Yes, sir.

Re-cross examination.

By Mr. COMAN:

Q. The sale of January 29, southeast corner of Broadway and Ninety-second street, for $199,000, was there a building loan with that; was that sold to Bingham Brothers?

A. No, sir; that was sold to a woman named Axelrod.

Q. Was there a loan with it?

A. Yes.

Q. Could you tell how much?

A. No.

Recess.

144 *Hearing, July 3, 1901.*

(NOTE.—The following testimony of Mr. Wells was taken for all cases, on July 3, 1901, and is a part of the record in this case, according to stipulation.)

JAMES L. WELLS, sworn for the plaintiff, in all the cases, testified:

Examined by Mr. PAGE:

Q. What is your business?
A. Real estate.
Q. How long have you been in the real estate business?
A. Over 25 years.
Q. What has been the character of the real estate business which you have done during that time?
A. I have bought and sold; I have sold very largely at public sales, and I have made many appraisements of property in all parts of the city; I confine my attention to the city of New York, particularly the boroughs of Manhattan and Bronx.
Q. Will you state more particularly the scope of your experience in the matter of appraising properties, what classes of property have you appraised, and for what institutions?
A. I have appraised pretty much all kinds of property where testimony was required or where evidence was desired in the purchase or sale of property or not, or loaning upon bonds and mortgages; I have appraised for banks and bankers, fire and life insurance companies, public institutions, title companies and estates; I think those embrace them.
Q. What public institutions have you appraised for in the city of New York?

The REFEREE: Is it necessary to go into particulars? He is evidently qualified as an expert. I suppose they won't object on the ground he is not a competent expert.

145 Q. Have you held any official position at any time in connection with the tax department in the city of New York?
A. Yes, sir.
Q. Will you state what position you have held and when?
A. I have been a tax commissioner of the city of New York.
Q. For what period?
A. I was appointed in June, 1895, and I was legislated out of office on the first of January, 1898, by the charter for Greater New York.
Q. When you were a tax commissioner, did you continue at the same time your personal business of appraising and buying and selling property?
A. I did; I have continued that business for over 25 years.

Q. In the course of the time when you were in office, were you familiar with the assessments which were made against real property in the city of New York?

A. I was.

Q. Were you familiar with the real property against which those assessments were made in the city of New York?

A. Very much of it.

Q. Are you acquainted with the assessed values in the city of New York for the year 1899?

A. Yes, sir.

Q. In the course of that year did you have occasion to examine assessed values of property in connection with the actual value of property?

A. I have made such examinations quite frequently during that year.

Q. Are you able to state the relation between assessed value and actual value in case of real property in the city of New York for the year 1899?

146 Objected to upon the ground that it is not a proper method of proving valuation or percentage, and the witness is not competent to state in a general way. This is a conclusion called for and not a statement of fact; objection overruled; exception.

A. Yes, sir.

Q. What was the relation between assessed value and actual value, assuming the actual value to be 100 per cent. in the year 1899 in the city of New York?

Same objection, ruling and exception.

A. In my opinion it was approximately 67 per cent.

Mr. FIERO: I move to strike out the answer on the ground such statement is too broad and general, and not proper or competent. That it is a statement of an opinion and not a fact, and a statement of an opinion not based upon facts stated by the witness.

Motion denied; exception.

Cross-examination.

By Mr. COMAN:

Q. About how many parcels of real estate are there upon the assessment-roll in the city of New York?

A. I can't tell you.

Q. About how many were there when you were tax commissioner?

A. I couldn't tell you without referring to the figures.

Q. Isn't it about 240,000?

A. I should imagine there would be as many as that; I had those figures at one time.

Q. Out of that number of assessments, if that be the number, how many parcels are you personally familiar with the value of?

A. I should imagine I appraise in the neighborhood of 2,000 parcels a year in my business and that is scattered over the entire city.

147 Q. As to parcels of property which you have not appraised have you personal knowledge as to their condition or as to their value?

A. What do you mean as to their condition, their physical condition?

Q. Yes.

A. I know the property generally, the same as any real estate man knows it.

Q. You know the outside of a house, perhaps?

A. I go into the inside of a house when I make an appraisement.

Q. I am speaking of property which you have not appraised?

A. Certainly I don't know the interior of a house I have not been in.

Q. Then you don't know what it is worth?

A. Yes, you get a general idea of what property in a location is worth; it is very easy to ascertain the value of the land and it is very easy to ascertain the size of the house and its height and compute the value.

Q. When you come to appraise a house you go through it?

A. When I can go through it I do.

Q. You consider that an essential to an accurate appraisal?

A. Yes; I should want an appraiser to do that if I was going to buy a house.

Q. So that as to the various parcels of real estate which you have not appraised and have not personally inspected you don't consider that you know what their value is?

A. Approximately I do know.

Q. But not close enough to make an appraisal of it?

A. Yes, sir; in most cases.

Q. Do you know their assessed value?

A. Not without examining; no man can carry all those things in his mind.

Q. How many parcels of real estate in the city of New York do you know the assessed value of?

148 A. I don't carry the records around with me; they are public records; when I want to use them I go and use them the same as you use law books.

Mr. FIERO: I now move to strike out the answer of the witness on the ground that it appears that the evidence is not given from personal knowledge except as to a very small proportion of the property in the city and as incompetent and improper.

The REFEREE: As I understand this witness, as to a large number of parcels all over the city, he knows the actual value, and as to a large number of those parcels he knows the assessed values scat-

tered through the city. He says that as to all those parcels the assessed value bears to the real value the relation of 67 per cent. That is the way I understand his evidence. I think that is competent. It is the only practical way to deal with such questions and I think it must be competent, and I refuse to strike it out. Otherwise you would have to take 240,000 parcels and go through with each parcel and that is wholly impracticable.

Defendant excepts.

It is conceded that the testimony given by Mr. Wells as to the relation between the value of assessed property and the actual value of real property in the city of New York as 67 per cent. covers the year which these certiorari proceedings are brought to review the assessment of.

(NOTE.—The following affidavit of Frank Bailey was read in evidence for all cases on September 4, 1901, and is a part of the record in this case, according to stipulation.)

Plaintiff's counsel offered to read in evidence the following affidavit of Frank Bailey with same force and effect as if the statements therein contained were orally sworn to before the referee:

Defendant's counsel objects to the same as immaterial and on the same grounds heretofore made to the same class of evidence,
149 but does not object to the form of the evidence offered.

Objection overruled. Exception.

STATE OF NEW YORK, } ss.:
County of Kings, }

Frank Bailey, being duly sworn, says that he is and has been for fifteen years with the Title Guarantee and Trust Company, and for six years its vice-president, and for eight years the secretary of the Bond and Mortgage Guaranty Company, and has had during that period charge of the business of said corporations in the borough of Brooklyn, city of New York.

That during the year 1900 the Title Guarantee and Trust Company passed on upwards of 5,023 titles of real estate situated in the borough of Brooklyn, either for the purpose of closing the sales of such real estate between the buyer and seller or for the purpose of negotiating loans upon said real estate through the said companies, and, in the regular course of business, this deponent knew the prices at which said property was transferred and the price at which it was appraised for the purpose of loaning money upon it and the assessed value thereof as shown by the assessment-rolls of 1900.

During the period of deponent's connection with the aforesaid corporations it has been necessary for him to acquaint himself thoroughly with the actual value of properties of all kinds in all the different sections of the borough of Brooklyn, and deponent is thoroughly familiar with the values of all such properties.

During the past three years deponent has been greatly interested

in the subject of assessment and taxation in the borough of Brooklyn, and has carefully investigated the ratio between the assessed and real value of properties throughout the entire borough of Brooklyn.

From actual knowledge of the sales and the selling prices
150 of at least one thousand separate pieces of property in the borough of Brooklyn during each of the years 1899 and 1900, and of the assessed valuations of a large proportion thereof upon the assessment-rolls of 1900, and from investigations separately conducted by deponent, and by the clerks of deponent, deponent has learned and believes the fact to be that the ratio between the assessed valuations upon the assessment-rolls for the year 1900 in the borough of Brooklyn and the actual value of real property in the said borough of Brooklyn averaged 65 per cent. The assessed values being above 65 per cent. of the actual value in some of the older wards and below 65 per cent. in the newer wards of the borough of Brooklyn.

Deponent verily believes that the average assessed valuation of all the real estate in the entire borough of Brooklyn upon the said assessment-roll of 1900 was about 65 per cent. of the actual market value of all of said real estate during said year.

FRANK BAILEY.

Subscribed and sworn to before me this 31st day of July, 1901.

JOHN L. SHERWOOD,
Commissioner of Deeds, City of New York,
Residing in the Borough of Brooklyn.

(NOTE.—The following testimony of Alexander Dumas was taken for all cases on July 16, 1901, and is a part of the record in this case, according to stipulation.)

ALEXANDER DUMAS, sworn for the plaintiff, testified:

I live at Flushing, Long island. I have lived in Queens county permanently about fifteen years. At the present time I have charge of the tax searching department of the Title Guaranty and Trust Company of the borough of Queens. I have held that position ever since they organized the department, about two years ago. Prior to
151 that I was cashier and deputy to the commissioner of the bureau of assessments and arrears, borough of Queens. I held that position about two years. Prior to that I was in the real estate business in Flushing, Long island, dealing in real estate throughout the entire borough of Queens. I have made a list of sales which have come to my knowledge in the borough of Queens for the year 1900 and the latter half of the year 1899, together with a list of the assessed value of those pieces of real property upon the assessment books of that year. I have such a list. I have figured the ratio between the assessed value and the value for which those properties were actually sold. That ratio is about 67 per cent.

Q. In your opinion, based upon this investigation, does that ratio

hold together throughout the entire assessment for that year in the borough of Queens, taking it as an average?

Objected to as incompetent.

The REFEREE: Has he examined so as to know?
The WITNESS: I made a fair comparison of them.

By the REFEREE:

I give the assessed value and the sale value here. I took these at random from each ward in the borough.

Plaintiff's counsel offered the list in evidence.

Mr. COMAN: I would like to examine him before it goes in evidence.
The REFEREE: Certainly.

Cross-examination.

By Mr. COMAN:

I obtained the information in its entirety from brokers and dealers, through the entire borough, who are clients of the company. The words "consideration in conveyance" is the appellation I classify them under. That is the amount of sale. I compared the records after obtaining this information and found them correct. I
152 obtained the information as to the consideration for the conveyance partly from the brokers who made the sale and partly through my connection with the company I represent.

By Mr. WELLS:

A large percentage of those deals were closed in my hands.

By Mr. COMAN:

The assessed value I took from the assessment-rolls. It would be impossible for me to take all the conveyances that went through my company in rotation; I had to obtain the information from the brokers and the dealers. I did use all the transactions that went through my company during 1900. I took all that the other brokers gave me. I didn't ask if they gave me all that they made. I asked them to give me their latest sales; I made no selection. They did not give me any list from which I picked. They were all during the latter half of 1899, 1900 and part of 1901. I did not tell those brokers what I wanted these sales for.

By Mr. WELLS:

About 60 per cent. of these deals went through my own hands.

By Mr. COMAN:

I cannot tell which ones, not from these records; I can if I am allowed time to pick them.

Defendant's counsel objected to the evidence so far as the information was derived from other brokers, upon the ground it is hearsay and incompetent.

By Mr. WELLS:

I compared the revenue stamps upon the deeds in each case with the expressed consideration, and they corresponded with the amount stipulated as the consideration.

153 By the REFEREE:

Q. Taking the 60, of which you have personal knowledge, would the average be the same?

A. Yes; if anything, I think the result would be smaller.

Q. Smaller how?

A. It would make it about 60 per cent.

By Mr. COLLIN: About 60 per cent. of consideration as compared with the assessed valuation; the assessed valuation would be about 60 per cent. of the actual consideration of the sale.

Mr. COMAN: I think I will withdraw that portion of the objection which refers to the information derived from brokers.

By Mr. COLLIN: The 67 per cent. spoken of as the assessed valuation is 67 per cent. of the actual consideration of the sales.

The statement was received in evidence, of which the following is a copy:

WARD NO. 1.

Old Long Island City.

Vol.	Block.	Lot.	Assessed value.	Consideration in conveyance.
1	47	41	$1,900	$2,750
1		43	1,900	2,750
1		40	1,900	2,750
1	80	4	1,600	3,300
1	46	15	1,100	2,100
1	28	47	6,000	8,000
1	28	41	1,500	2,100
12	85	30-33	2,350	3,800
12	85	49	2,300	3,500
12	62	5	1,800	2,300
8	85	22-23	600	700
12	77	27	2,100	2,250
12	62	5	1,800	1,525
12	100	118	1,300	1,525

154

Ward No. 2.

Old Town of Newtown.

Vol.	Block.	Lot.	Assessed value.	Consideration in conveyance.
4	4	23	$1,000	$1,700
4	8	18–19	400	700
10	194	53	1,400	2,200
8	33	30	1,500	2,200
8	33	30	1,560	2,200
10	157	41	1,300	1,600
1	79	8 & 62	600	1,000
1	151	22	4,650	6,000
3	77	20	2,500	3,600
1	74	47	2,000	3,400
10	157	28–29	1,000	1,800

Ward No. 3.

Old Town of Flushing.

Vol.	Block.	Lot.	Assessed value.	Consideration in conveyance.
3	55	58–59	$2,100	$3,500
1	79	25	1,000	1,600
1	8	16	15,000	20,500
3	58	74	200	1,300
3	89	23	2,000	3,100
1	65	49	1,500	2,080
1	7	Street	2,000	3,000
4	120	26	2,500	4,200
3	89	13	500	700
4	44	9	1,000	1,600
3	75	51	2,000	5,250
3	151	2	1,500	1,700
3	37	45	2,000	3,800
3	82	18	2,500	4,100
3	93	55–57	3,100	4,000
3	77	20	2,500	3,600

155

Ward No. 4.

Old Town of Jamaica.

Volume.	Block.	Map.	Lot.	Assessed value.	Consideration in conveyance.
5		30	396	$1,600	$2,350
2	8		166	1,400	1,800
1		9	126	400	575
7	23		16	800	1,200
4	11		20 & 37	450	625
1	12		478	2,000	3,000
1	6		257	2,500	4,110
2	13		87	1,600	2,500
4	2		4	5,000	7,100
1		6	59	2,200	4,000
2		43	278	1,300	2,100
4		10	44	5,000	8,100
1		32	356	1,400	2,500
4		20	331	1,800	2,600
6		24	340 & 342	2,100	3,000

Ward No. 5.

Part of Old Town of Hempstead, Known as Rockaway Beach, Arverne, and Far Rockaway.

Vol.	Block.	Lot.	Assessed value.	Consideration in conveyance.
2	60	109	$800	$1,300
1	52	1	2,200	3,800
1	3	48	7,100	10,240
2	24	62	2,400	3,600
1	54	46	700	1,000
2	19	11	2,000	3,500
1	19		3,000	4,500
1	17	53	1,900	2,700
2	54	36	2,000	3,000
1	27	87	7,000	10,500
1	55	13	700	1,000
1	56	3	1,000	1,500
1	39	12	300	525
1	64	42	600	850
1	39	32	300	525
2	72	15	4,000	5,800

156 *Hearing of September* 18, 1901.

It is further stipulated that the tax rate for the county of New York for the year of the special franchise assessment for which the certiorari proceedings are brought to review was .0224771.

It is further stipulated that a notice transmitted to the relator company, stating that an assessment on its special franchises had been made and that the total amount thereof was $15,828,600, and the State board would meet at its office at Albany on the 10th day of April, 1900, to hear and determine any complaint as to the assessment was of the following form:

No. 98.

(*Form A—Notice of Assessment and Hearing of Complaints.*)

Office of the State Board of Tax Commissioners.

ALBANY, N. Y., *M'ch* 20, 1900.

To —— ——:

You will take notice that under the provisions of the tax law relating to the taxation of public franchises as real property, the State Board of Tax Commissioners has made an assessment upon special franchises constructed, maintained or operated by you, and fixed the total valuation thereof at the sum of —; and fixed the valuation thereof in the respective cities, towns and tax districts in which such special franchise is situated, as follows:

City of New York, borough of Manhattan..... $

157 You will further take notice that this board will meet at its office in the city of Albany on the 10th day of April next, at 10 o'clock a. m., to hear and determine any complaint concerning such assessment.

Yours very truly,

STATE BOARD OF TAX COMMISSIONERS,
By PETER DEYO, *Secretary.*

It is also stipulated that a notice served upon all the other relator companies whose proceedings are now pending before the referee was similar in form.

The following is a stipulation in the Metropolitan case, which, by stipulation, becomes a part of the testimony in this case:

It is stipulated in all cases, subject to the same objection as heretofore made by defendants to the same class of testimony, and the same ruling and exception, that the total assessed valuation of real

estate in the city of New York for the year the taxes of which these certiorari proceedings are brought to review, by counties, were, viz.:

Name of county.	Assessed value.
New York	$2,178,605,905
Kings	609,822,267
Queens	103,752,600
Richmond	40,264,692

The percentages which the assessed values bore to actual values as fixed by the State Board of Tax Commissioners for said year, in said counties, were as follows:

Name of county.	Percentage.
New York	67
Kings	68
Queens	80
Richmond	66

158 (NOTE.—The following statement is taken from the record in the Metropolitan Street Railway Company's case and is a part of the record in this case, according to stipulation.)

Plaintiff's counsel, Mr. Page, offered in evidence a statement based upon the records for the year during which these certiorari proceedings are brought to review, of the State Board of Tax Commissioners, showing the aggregate tentative valuation of special franchises and the aggregate final assessments of special franchises made by the State board for that year; the aggregate of the tentative being $307,290,806; the aggregate of the final valuations being $266,202,759, and the difference being $41,088,047 between the tentative and the final valuations or assessments made by the State board of assessors.

Objected to as incompetent and immaterial; objection sustained; exception.

Hearing of November 26, 1901.

Plaintiff's counsel offered in evidence, in all cases, statement, no objection being made by defendant's counsel to the correctness of the facts therein contained, as follows:

That in proceedings heretofore begun in the supreme court to review the assessment fixed on the special franchises of certain companies for the year the taxes of which the present certiorari proceedings have been brought to review; the defendants in the same are the same defendants as in these proceedings, viz.: George E. Priest, J. Edgar Leaycraft, Lester F. Stearns, as tax commissioners of the State of New York, and constituting the State board of tax commissioners.

159 That in the proceedings of The People of the State of New York *ex rel.* New York Telephone Company against The State Board of Tax Commissioners, being one of the proceedings above referred to, findings were made and orders hereby referred to and made part hereof were entered thereon by the court, containing the following provision:

It is further adjudged that said assessment of the relators' special franchises as made by the State Board of Tax Commissioners and entered upon the assessment-rolls of the various boroughs of the city of New York for the year 1900, as follows:

"At the sum of two million, six hundred and fifty thousand, one hundred forty-five ($2,650,145) dollars, in the borough of Manhattan; and two hundred ninety thousand, seven hundred thirty-eight ($290,738) dollars in the borough of the Bronx; amounting in all to the sum of two million, nine hundred and forty thousand, eight hundred eighty-three ($2,940,883) dollars, is excessive and unequal and the equalized valuation of said special franchises for the year being and hereby fixed as follows:

"In the borough of Manhattan, the sum of one million, seven hundred seventy-five thousand, five hundred ninety-seven and fifteen one-hundredths ($1,775,597.15) dollars. In the borough of the Bronx, the sum of one hundred ninety-four thousand, seven hundred ninety-four and forty-six one-hundredths ($194,794.46) dollars.

"Amounting in all to the sum of one million, nine hundred and seventy thousand, three hundred and ninety-one and sixty-one one-hundredths dollars ($1,970,391.61), to which amount the said assessment is reduced."

That findings have been made, and orders confirming the same and reducing assessments have been entered thereon containing provisions of similar tenor in case of other companies, being
160 the companies whose proceedings are above referred to, the names of said companies and the amounts of said assessments as fixed by the said board and the amounts of the same as reduced by the court and the percentage which the reduced assessment constitutes in amount with respect to the original assessment fixed by the State board as of January 8, 1900, being as follows:

Name of corporation.	Original special franchise assessment.	Reduced special franchise assessment.	Percentage reduced assessment constitutes of original assessment.	Relation of assessed to actual value as fixed by State Board Tax Commissioners.
Rochester Railway Co...	$2,057,000 00	$1,234,200 00	.60	.80
Hannacroix Water Co....	14,000 00	10,000 00	.714	.78
Buffalo Traction Co.....	463,580 00	324,506 00	.70	.68
Buffalo Railway Co.....	3,378,290 00	2,364,803 00	.70	.68
Hudson River Telephone Co. (Gloversville).....	14,500 00	10,585 00	.73	.73
Hudson River Telephone Co. (Albany).....	148,530 00	115,853 40	.78	.78
Rochester Gas and Electric Co.....	1,751,000 00	1,050,600 00	.60	.80
Crosstown Street Railway Co.....	1,824,675 00	1,277,272 50	.70	.68
Empire City Sub. Co. (Manhattan).....	3,324,682 00	2,227,536 94	.67	.67
Empire City Sub. Co. (Bronx).....	46,164 00	30,929 88	.67	.67
N. Y. Telephone Co. (Manhattan).....	2,650,145 00	1,775,597 15	.67	.67
N. Y. Telephone Co. (Bronx).....	290,738 00	194,794 46	.67	.67
N. Y. and N. J. Telephone Co. (Queens)...	161,669 00	129,335 20	.80	.80
N. Y. and N. J. Telephone Co. (Brooklyn)..	764,472 00	519,840 96	.68	.68
N. Y. and N. J. Telephone Co. (Richmond).	105,741 00	69,789 06	.66	.66
Troy Gas Co.....	470,500 00	366,990 00	.78	.78

The amount set forth in the last column of the foregoing statement is the amount as fixed by the State Board of Tax Commissioners as the percentage which the assessed value bears to actual value in the counties in which the companies' properties above referred to are situated.

Objected to as irrelevant and incompetent, but that no objection is made to the statement on the ground that the facts contained in the same are not true.

161 *Hearing December* 6, 1901.

FRANK J. BELL, sworn for the defendants in all cases, testified:

Examined by Mr. FIERO:

Q. Where do you reside?
A. Bloomfield, N. J.
Q. What is your business?

A. Deputy tax commissioner of the city of New York.

Q. What are your duties as such?

A. I am assigned as chief in charge of the deputies making the real estate assessments.

Q. How many deputies are there in the office of the commissioner of taxes of the city of New York in the real estate bureau?

A. About forty-six.

Q. As to the nature and character of your duties, whether supervisory or otherwise?

A. My duties are supervisory.

Q. How far does that enable you to obtain knowledge with regard to the actual value as well as assessed value of real estate in the city; state a little in detail the character of your duties?

A. The assessed values are constantly before me; the reports of the deputies making changes in assessed values are always made to me and from me to the commissioners; tabulated by me and presented to the commissioners in aggregate and in different forms for their consultation over them; I am constantly meeting taxpayers who are contesting and criticising our assessed valuations; those are the particular forms in which the matters come before me.

Q. As to your actual knowledge of values, how far does that extend and how obtained?

A. I necessarily get some knowledge of the actual values of real estate from these observations.

162 Q. Have you made any personal examination in the office of the register of the city of New York with regard to sales of real estate as compared with assessed values within the past few days?

A. Yes, sir; I compared the list which I presented when I was last here.

Q. List of what?

A. List of sales in Manhattan; I have compared each record, each instrument, taking the grantor's and the grantee's name, the description of the property, the amount it sold for, the date of the instrument and in some cases the reference to other instruments referring to the same transaction.

Direct examination (continued):

Mr. BELL: I have examined the list of sales of properties in the borough of Manhattan, covering two pages of cap paper, and find that, with two exceptions, they are on or near the line of Broadway, north of Forty-second street, the line of the rapid transit improvement, where transfers have been numerous, where speculation has been rife and where considerations (I will not call them values) have been advancing with each transfer. Such considerations cannot be fairly used in comparison with assessed values to arrive at percentages, and especially to fix a fair percentage for the whole city. Such considerations, it is true, are the index of the feeling of speculators and may or may not later be sustained as real values.

Even where these properties are properly improved the incomes

do not warrant the values as indicated by the considerations expressed, the interest on mortgages, the taxes and the fixed charges together bearing such a large ratio of percentage to the income that holders are in many cases wiped out by foreclosures.

The conservative policy used in fixing values for taxation as prescribed by law, viz., "the amount for which, under ordinary
163 circumstances, they will sell," would not warrant following immediately in the wake of speculative transfers. It is only the settled and fixed values which are used as a basis for assessed valuations.

Of the two exceptions on the list previously referred to, I will call attention, first, to the one at the southwest corner of Second avenue and Seventy-second street, which is given as having been sold by Martin Metzger to Egan & Hallecy, at $19,000, and assessed at $14,000. The sale in this case was of land 59 feet wide, while the assessed valuation quoted was on only 30 feet. The grantees in the transfer are parties whose names appear in several of the transfers quoted on the list; they are speculative builders, frequently on building loan schemes, and it is in such transfers that fictitious amounts are so frequently used in their deeds, covering not alone the real value of the property, but a consideration for the loan as well. This is indicated by the record of sale in this case to those who are accustomed to "reading between the lines." The mortgage is given as $23,000, the consideration named "valuable consideration and $100."

The second exception is No. 202 Broadway, which is recorded as having been sold at $300,000, and which is assessed at $270,000, indicating the relation of the assessed value to the consideration expressed of 91 per cent., or nearly full value. In this section of the city values are well settled and definite, and the assessed valuations are so close to the amounts for which they will sell under ordinary circumstances, that the whim of the purchaser in his anxiety to secure a certain piece of property, or the embarrassment or caprice of an owner in his desire to sell, frequently results in transfers above or below the assessed valuation of the commissioners. There is probably no other city where these whims and embarrassments exist to the extent they do in New York. I quote in this connection the sale of No. 67 Wall street, which sold on September 25, 1899, at $180,000; it was assessed at $210,000. I also quote No. 210
164 Broadway, sold on May 15, 1901, at $105,000, and was assessed at $140,000. I will state definitely and particularly that all three of these properties are assessed in proportion to adjacent and similar property.

A further reason, tending to show low percentage, is that the assessed valuations are placed in the fall (commencing the first week of September) of the year previous to the one in which taxes are payable, in October. During this time (more than twelve months) several transfers sometimes occur on the same piece of property, and when prices are booming, consequently the result is a lower percentage for the assessed valuations. All this, in connection with the fact

that, as a rule, it is only active properties that sell and are transferred, and with which a comparison may be made, and that the great mass of property is in a normal condition, and is not sought for by purchasers and is not transferred, tends to show that the whole is more nearly assessed at its real value than would appear alone from the transfers of the comparatively few active pieces, representing only a small fraction of the entire city.

I attach a list of a few transfers, covering every section in Manhattan, which more nearly show the correct situation than the list of special pieces shown me, covering only the one section of the city, and which is beyond peradventure the most speculative of any that could have been selected.

Manhattan.

Section 1.

	Assessed val.	Record of transfer.		Percentage.
22 Chatham Sq	$11,000	Apr. 13,	$12,500	88
105 Division	7,000	Jun. 19,	7,800	89
253 South	19,000	Sept. 11,	18,000	105
67 Wall	210,000	Sept. 25, 1899	180,000	116
119 Baxter	16,000	July 8, 1899	17,100	93
396-398 Canal	37,000	July 14, 1899	41,250	89

165

Section 2.

528-530 6th St.	$27,000	Jan. 6, 1899	$31,000	87
14 E. 19th St	18,000	Feb. 27, 1899	19,240	93
153-55 Spring	85,000	Jun. 1, 1899	92,000	92
386-388 W. B'way	50,000	May 12, 1899	48,500	103

Section 3.

232 W. 15th St	$7,000	Apr. 17, 1899	$8,000	87
516-522 W. 35th St	38,000	May 1, 1899	41,000	92
3 & 5 W. 22d St	80,000	Jun. 2, 1899	90,000	89
362 Third Ave.	37,000	Apr. 14, 1899	40,000	92
49-55 W. 27th St	365,000	Apr. 27, 1899	400,000	91

Section 4.

254 W. 88th St	$13,000	Feb. 17, 1899	$15,000	90
32 W. 60th St	10,000	Mar. 8, 1899	10,000	100
N. E. C. Riverside & 84th St	64,000	Mar. 8, 1899	60,500	105
367 W. 56th St	12,000	Apr. 13, 1899	12,250	100
N. W. C. Cen. Pk. W. & 91st St.	140,000	May 17, 1899	150,000	93
118-122 W. 61st St.	57,000	Oct. 13, 1899	60,000	95
1680-1684 B'way	140,000	Nov. 20, 1899	150,000	93

Section 5.

	Assessed val.	Record of transfer.		Percentage.
446 E. 72d St	$4,500	Jan. 9, 1899	$4,600	98
168 E. 73d St	11,000	Jan. 17, 1899	11,000	100
108 E. 54th St.	21,000	Jan. 19, 1899	20,000	105
238 E. 45th St.	10,000	Feb. 24, 1899	9,000	111
800 Lexington Ave.	14,000	May 16, 1899	15,000	90
19 E. 56th St.	46,000	Oct. 2, 1899	50,000	92

166

Section 6.

26 W. 115th St.	$10,500	Nov. 18, 1899	$12,000	87
117 E. 129th St	6,500	July 15, 1899	7,750	83
417 E. 119th St	6,000	Apr. 29, 1899	7,500	80
2109 Second Ave.	27,000	Sept. 9, 1899	30,750	87

Sections 7 and 8.

474 W. 144th St.	$10,000	Sept. 7, 1899	$11,000	90
285 W. 147th St.	12,000	Oct. 12, 1899	13,500	88
140th St., S. S., 100 ft. E. of 10th Ave	4,000	Mar. 9, 1899	5,000	80
N. S. 167th St., 77.3 ft. W. of Amsterdam Ave.	5,500	Feb. 2, 1899	6,000	91
320 Riverside drive	75,000	May 10, 1899	77,500	97
541 W. 125th St.	13,500	Jun. 20, 1899	15,000	98
238 W. 134th St	18,000	Jun. 30, 1899	18,000	100
221 W. 135th St.	7,500	Jun. 21, 1899	8,000	93
180-182 W. 125th St.	36,000	Sept. 26, 1899	40,000	90
230 W. 131st St.	10,000	Sept. 27, 1899	10,000	100
169 W. 97th St	9,000	Sept. 23, 1899	10,000	90
277-279 W. 127th St.	30,000	Dec. 6, 1899	30,000	100
248 W. 124th St.	15,500	Dec. 13, 1899	11,000	114

I have also read the evidence of Mr. Alexander Dumas, of the borough of Queens, and examined, at some length, the list of sale appended thereto.

There is probably no borough in the city in which exists so vast a difference in the judgment of value as in the borough of Queens. Much of the property was assessed prior to the Greater New York charter, so far beyond its value, that it was hard to realize the exact situation, or to believe evidence of real value.

Mr. Dumas quotes seventy two pieces, which, he claims, are assessed at 67 per cent. of the record of the sales. Without going into the question of these sales I will simply quote seventy-two
167 other sales, taken from every ward in the borough, which are fully recorded and well authenticated, in which the assessed valuation bears to the selling price the percentage of 111 per cent., shown as follows:

Ward 1.

Vol.	Block.	Lot.	Assessed val.	Am't sold for.	Date.
1	30	22	$25,000	$18,700	Apr. 4, 1900
2	79	29	1,000	1,000	Mar. 1, 1899
3	29	26	1,900	1,500	Jan. 8, 1900
4	125	13	3,000	2,985	Apr. 16, 1900
	125	13	2,000	3,242	July 20, 1900
	122	2	1,200	1,150	Jan. 21, 1899
	134	1	2,200	2,000	Aug. 5, 1899
	138	19	1,200	1,175	Sept. 2, 1899
5	155	64–66	3,200	3,075	Feb. 21, 1900
	171	33	600	650	Jan. 9, 1900
6	263	20	2,700	3,000	Oct. 22, 1899
7	8	4	450	350	Feb. 15, 1899
	24	50	200	180	Apr. 22, 1899
	21	51	200	180	Apr. 22, 1899
8	48	18	20,000	20,000	June 29, 1900
	53	35	700	450	Feb. 15, 1899
	82	27	800	600	July 15, 1899
	48	1	11,000	10,000	Oct. 11, 1899
	45	2	1,700	1,825	Oct. 5, 1899
9	125	10	1,800	1,500	July 18, 1900
	126	8	2,900	3,100	July 8, 1899
	126	8½	4,200	4,600	July 8, 1899
	111	15	1,300	1,300	Aug. 5, 1899
10	171	39	350	300	Dec. 28, 1898

Ward 2.

1	15	49	$200	$150	June 4, 1900
6	23	1	1,400	1,000	May 10, 1900
7	16	26	300	100	May 10, 1900
	16	26	300	100	May 10, 1900
8	72	9	125	125	May 7, 1900
	20	12–14	800	875	June 1, 1900
	29	22	200	150	June 15, 1900
	29	26	200	150	June 15, 1900
7	20	23	600	600	May 12, 1900
10	157	41	1,300	1,600	May 21, 1900
4	39	22	2,500	2,500	May 11, 1900
	38	53	5,000	4,000	May 18, 1900
10	171	11	150	150	May 22, 1900
7	113	18	1,100	1,000	June 3, 1900
	240	240	2,000	2,000	July 14, 1900
1	41	15	500	500	July 18, 1900
6	36	30	900	800	May 10, 1900

168

Ward 3.

3	16	1	$5,000	$5,000	Nov. 13, 1900
4	153	11	160	140	Apr. 3, 1901
3	40	27	6,000	5,000	Oct. 25, 1900
4	117	23	5,000	4,500	Apr. 23, 1901
4	132	51	2,000	2,220	Mar. 14, 1901
4	101	27–30	160	150	Apr. 11, 1901
3	12	36	4,500	4,750	Mar. 22, 1900
1	19	25	1,500	1,500	" 14, 1901

Ward 4.

Vol.	Block.	Lot.	Assessed value.	Amount sold for.	Date.
1	2	150	$1,800	$2,000	1899
2	62	14	1,000	800	1900
	53	25	400	350	1900
		35	1,400	1,400	1900
	38	10	1,200	1,200	1900
3	16	764	300	300	1900
	3A	69	150	125	1900
4	12	12	3,000	2,840	1900
	12	302	2,000	1,800	1900
	13	281	1,000	1,100	1899
5	25	601	600	600	1900
	26	156	150	150	1900
	26	118	200	200	1899

Ward 5.

1	58	95	$2,300	$2,500	Oct. 9, 1900
1	44	60-61	5,000	5,000	Sept. 18, 1899
1	13	20	2,000	2,000	Jan. 18, 1899
	15	19	5,000	5,000	May 18, 1899
	6	1	2,500	1,600	Apr. 1899
1	26	59	9,500	5,000	Dec. 6, 1900
1	12	28	4,000	3,700	Jan. 28, 1901
1	62	76	2,200	1,500	Nov. 13, 1900
2	61	8	750	750	Apr. 5, 1901
1	51	65	2,600	1,000	Nov. 9, 1900
			$181,545	$162,887	

111 per cent.

169 Cross-examination.

By Mr. PAGE:

Q. In reference to your testimony to-day, have you consulted with other officials in the tax department?

A. I have had several conversations with the president and one conversation with one of the commissioners.

Q. Has your conversation with the president been with reference to the testimony you were to give to-day?

A. No, sir; there was nothing said about that; we talked about the paper which I brought up on my last visit.

Q. That paper which you now refer to was a paper with the contents of which Mr. Feitner is familiar?

A. Yes, sir.

Q. That reflects his views as well as your own, does it not?

A. Yes; I may say it does because he approved it; he said he thought that was the situation.

Q. Mr. Feitner has been for several years last past, and still is the chairman of the tax department?

A. He is president of the board, and was 16 years ago, when I went there, a member of the board.

Q. He was a member of the tax board of the old city of New York, and at the present time is president of the tax department of the greater city of New York?

A. Yes, sir.

Q. Mr. Feitner occupied that position in 1899 and 1900, did he?

A. Yes, sir; both years.

Q. So that in coming here to-day you give the official views of the tax department upon this subject, do you not?

A. I may incidentally do so, but I don't think it was arranged I should do so.

Q. It was known you were coming up here to-day to testify in this proceeding?

A. Yes, sir.

170 Q. You came with the approval of the president of the tax board?

A. Entirely so.

Q. And the other members of the board as well?

A. Yes, sir; although I don't think there was any formal result or resolution about it; I know there was not; they all knew about it.

Q. They all knew of the fact that this proceeding was going on in which was up for examination the question of the ratio between assessed value and actual value in the city of New York?

A. Oh, yes; they knew that.

Q. Into how many tax sections for the purpose of assessment under the block system is the city divided at the present time, the borough of Manhattan?

A. We call them sections, but the tax districts are not similar.

Q. There is a division by sections?

A. Yes, sir; there is a division by sections.

Q. How many are there in Manhattan?

A. Eight in Manhattan; there are twelve tax districts.

Q. These sectional divisions which you have referred to are eight in number and cover the borough of Manhattan?

A. Yes; those are the block land map tax sections.

Q. Are these fairly equal so far as the territory included in each section is concerned?

A. No, sir; very unequal.

Q. How does the first section compare with others?

A. The first section runs to Grand street nearly straight across from river to river.

Q. That is one of the most valuable of all sections?

A. Much the most valuable; the second section extends to Fourteenth street, straight across.

Q. That is another valuable section?

A. Yes, sir.

Q. How about the fourth section?

171 A. The fourth section is a very valuable section called the west side, extends from Fifty-ninth street to Ninety-sixth street, west of Central park and Sixth avenue.

Q. These sections are fixed by law in the charter of the city?

A. Yes, sir; the land map law.

Q. About two years ago an article appeared in the "Record and Guide," stating what the tax department methods were and how lands and buildings were valued for taxation; you remember that, I take it?

A. I think I do; yes.

Q. In this number of the "Record and Guide" to which I refer the article which relates to tax departments and method is based, is it not, as you recall it, upon an interview with yourself and another interview with Mr. Feitner?

A. Yes, sir.

Q. You read that article, didn't you, after it appeared?

A. Yes; I did.

Q. That correctly reported your statement, did it not, as made at that time?

A. That is my recollection of it; yes; I don't remember distinctly now; an indefinite recollection I have that it did agree with my views.

Q. (Presenting same.) I suppose there is no question but what those are sheets from the "Record and Guide?"

A. Yes; that was just after the investigating committee had criticized our methods.

Q. The Mazet committee?

A. Yes, sir.

Q. This is the article in the "Record and Guide" to which we have previously referred?

A. Yes, sir.

Q. This article at this time was an article that was given out by yourself and Mr. Feitner after you had gone over the article?

A. I prepared the article.

Q. The entire article that appears there?

A. That is my recollection.

172 Q. Mr. Feitner saw that before it went out?

A. Oh, yes.

Q. The figures and statistics which are contained in that article were prepared by you in the same way as the figures which are given in your testimony on direct examination, weren't they?

A. Yes, sir.

Q. That is to say, you went to work and prepared your data in the same way in each case?

A. Yes, sir; except that I didn't go to the register's office on these; I took these from the "Record and Guide" and from the "Law Journal;" in that sheet I have gone over to the register's office and compared them.

Q. These figures which appeared in your direct-examination, in the first instance, were prepared in the same way?

A. Yes, sir.

Q. You went over and verified them to the register's office?

A. Yes, sir.

Q. In your verification you found that the statements in the "Record and Guide" were correct; in other words, there wasn't anything which required correction after your verification?

A. In the document presented here?

Q. Yes?

A. I found only two discrepancies.

Q. Those were slight?

A. Minor ones, and one correction was made in the register's office.

Q. You have no doubt about the correctness of the figures which appeared in that article?

A. None whatever.

Q. You have spoken about the Mazet investigating committee and the fact that this article appeared shortly afterward; there was an issue investigated by that committee among others as to the ratio between actual and assessed value in the city of New York?

A. That wasn't the point here.

173 Q. That issue was considered before the Mazet committee?

A. I don't think so; the issue was altogether on our percentage of increased valuation, the unevenness of it.

Q. You were present before the Mazet investigating committee, weren't you?

A. I was part of the time.

Q. Mr. Feitner was there part of the time?

A. Yes, sir.

Q. You were there when Mr. Feitner testified, weren't you?

A. On one occasion I was; I think he testified on two or three occasions.

Q. Was it the first or last occasion when you were present?

A. That I can't remember; I remember of hearing him testify.

Q. In the course of this testimony—and I now read from volume 4 of a volume entitled, "Investigation of the Public Offices and Departments of the City of New York, 1899"—the minutes of the hearing which took place on the 10th of October, 1899, it is from the testimony of Mr. Thomas L. Feitner, page 4020—I should add that this volume is officially entitled, "The Report of the Special Committee of the Assembly, appointed to investigate the Public Offices and Departments of the City of New York, and of the Accounts therein included, transmitted to the legislature January 15, 1900. Printed by James Lyon, State printer." Before I ask this question I presume the counsel for the defendant will have no objection to my asking this stipulation, that this printed volume is a correct transcript of the minutes of those proceedings.

Mr. FIERO: If you ask the question we will raise the question.

Mr. COMAN: It is the official edition.

174 Mr. FIERO: We are not going to make an objection upon that ground. Ask your question and we will make the objection on the ground the evidence is not competent or proper as to what Mr. Feitner said.

Mr. PAGE: You have no objection to it going on the record it is agreed this is the official edition and it is a correct transcript of the minutes?

Mr. FIERO: Say you read from the official edition and that will cover *cover* the whole ground.

Q. I read from the official report of the special committee of the assembly appointed to investigate the public offices and departments of the city of New York, and of the accounts therein included. Transmitted to the legislature January 15, 1900, no objection being made to the same as not being a correct transcript of the minutes of the proceedings of that committee. I read as follows, with the explanation above given to Mr. Bell: "The witness (that is Mr. Feitner) That is the very serious question in dispute. From our examination in our department, unofficially, we are satisfied that the rest of New York State is not assessed more than 40 per cent. of the fair general value, while we always maintained here that we ran from 60 to 65 or 70 per cent., and fairly maintained it; so that in place of being anything added to it there ought to be at least two or three hundreds millions of dollars taken off the valuation of New York city." Do you recall Mr. Feitner gave testimony of that tenor?

Objected to as incompetent, irrelevant and immaterial.

The REFEREE: I don't see how it is competent, what Mr. Feitner swore to or testified to on that occasion.

Mr. PAGE: I am going to ask Mr. Bell if he was cognizant of this testimony having been given, and the further question is of obvious propriety if he knew about it.

175 The REFEREE: You can question him about it; you may ask him what his view was at that time. I don't see how it is important to ring in here what Mr. Feitner testified to, or how it is competent.

Mr. PAGE: The point is Mr. Feitner was before that committee with Mr. Bell, representing the New York tax department, that was being investigated, and here was a statement made by the president of the tax board and Mr. Bell was present at the same time and knew of this testimony being given, and I want to go on from this point and ask him if he concurred in it, or similar questions to that effect. I first want to know if he knew it was given.

The REFEREE: You can get at it directly by asking him what his view was at that time in 1899 upon this very question.

Mr. PAGE: Your honor sustains the objection?

The REFEREE: Yes.

Plaintiff excepts.

The REFEREE: For the purpose of refreshing his memory you can call his attention to that, but after all it is his evidence as to the

comparative value. He knows now what you are after. Just ask him the question.

Mr. PAGE: This is offered in connection with the witness's previous testimony and also as an official statement by the head of the tax department of the city of New York.

The REFEREE: I don't think in either aspect it is competent. You have got this witness here now, take his evidence and his judgment on that question.

Q. Has your recollection been refreshed by hearing me read the statement from the report of the committee?

A. It has been refreshed as to the circumstances; I didn't hear that testimony.

176 Q. Did you afterward hear of such testimony having been given?

Objected to as hearsay; objection overruled; exception.

A. Yes sir.

Mr. FIERO: We now move to strike out the last answer that he heard Mr. Feitner give this testimony, on the ground it is incompetent and improper.

The REFEREE: I will strike it out if there is nothing more to follow it.

Q. Did you ever have any conversation with Mr. Feitner and seek to correct testimony of that character?

Objected to; objection sustained; exception.

Q. Did you ever take any exception to Mr. Feitner's testimony as given before the Mazet committee on the ground that you disagreed with him?

Objected to; objection sustained; exception.

Mr. FIERO: I take it that answer which we move to strike out goes out.

Mr. COMAN: We move to strike out all of the evidence with reference to the examination of Mr. Feitner before the Mazet committee.

The REFEREE: Let us see what his offer is.

Mr. PAGE: I now offer in evidence the concluding portions of the article from the "Record and Guide," a paper published in the city of New York, dated October 28, 1899, page 637, which article the witness has previously verified as an article which he prepared. I offer that part which is marked.

The REFEREE: That is all that is pertinent, is it?

Mr. PAGE: That is all that is pertinent.

Mr. FIERO: We don't think so.

177 The REFEREE: You can offer the balance.

Mr. FIERO: We object unless the whole paper is offered; a portion ought not to go in unless all is offered.

Mr. PAGE: We offer that part.

The REFEREE: You offer what portion you choose to.

Mr. FIERO: That we object to as immaterial, incompetent, not sufficiently proved and irrelevant.

The REFEREE: The witness testified they were his figures; the evidence is competent on cross-examination.

Defendant excepts.

The following is a copy of the portion offered:

Record and Guide, Page 637.

The tax valuation of the Bennett building was increased from $600,000 to $750,000. This building occupies the whole front, from Ann to Fulton streets, on the west side of Nassau. It covers 10,200 square feet and is 11 stories high. The land value as fixed by the department is $60 per square foot, which would be equal to $612,000; the building, 11 stories, contains 112,200 square feet of floor surface and the factor employed is $448,000; total value, $1,060,000; assessed, $750,000. There is no doubt about the value here, as there are a number of sales to show such values, and the factor per square foot of floor surface cannot be seriously at fault. What is noticeable in all these instances is that the assessed value bears about the same relative proportion to actual value as ascertained by the formula of the department, and so far as they go sustains its claims of equality of assessment. In the following list of properties, sold since the assessments were raised this year, the testimony on this point is not so unanimous, but it serves to show that the tax valuations placed upon downtown Broadway and Fifth avenue properties were not excessive as compared with those of parcels located in other thoroughfares and sections:

178

Location.	Assessed value.		Sold for.
	1898.	1899.	
432-436 West Broadway	$36,000	$45,000	$58,750
59-65 Liberty	350,000	475,000	580,000
555 Broadway	105,000	135,000	155,000
189 "	135,000	150,000	350,000
51 Nassau	25,000	50,000	60,000
3-5 West 18th	155,000	175,000	190,000
3-5 West 22d	50,000	80,000	90,000
1131-1133 Broadway	800,000	1,700,000	2,725,000
373-375 "	245,000	290,000	400,000
395-399 "	160,000	183,000	385,000
61-65 Walker	63,000	90,000	
S. W. cor. Broadway and Broome	325,000	400,000	850,000
26-28 Broad	240,000	340,000	500,000
110-116 Washington	75,000	100,000	123,000
14 Cortlandt	65,000	90,000	200,000
11 Park row	110,000	160,000	205,000
283-285 Pearl	80,000	95,000	140,000
18-20 Frankfort	45,000	50,000	75,000
34 Reade	42,000	55,000	75,000
133 West 15th	10,000	11,000	16,500
161 West 23d	26,000	30,000	41,600
142 West 24th	8,000	9,500	13,500
114 West 26th	8,000	10,000	17,500
110 West 38th	16,000	22,000	32,000
43 West 19th	19,000	22,500	34,500
430-434 6th avenue	150,000	160,000	195,000
224 5th avenue	80,000	115,000	190,000
47 West Thirty-sixth	18,000	21,000	36,000
42 West 40th	25,000	35,000	50,000
306 312 4th avenue	275,000	32 ,000	440,000
7 West 26th	75,000	87,000	170,000
2 West 27th	18,000	22,000	
523 5th avenue	100,000	150,000	220,000
360 3d avenue	25,000	27,500	34,000
60 West 55th	18,500	20,000	27,250
20 East 46th	23,000	25,000	35,000
576 Madison avenue	31,000	36,000	50,000

The REFEREE: On your motion everything that was said by Mr. Feitner on that examination is stricken out.

Mr. HILL: That is the examination before the Mazet committee?

The REFEREE: Yes.

Plaintiff excepts.

Mr. FIERO: We offer the balance of the article.

179 The following is a copy of the portion offered by defendant's counsel:

(Record and Guide, page 635.)

Tax Department Methods.

How land and buildings are valued for taxation.

The system under which the values of their properties are assessed for the purposes of taxation must form a matter of strong interest to property-owners. Knowing this, when the charter required the tax department to "establish a just and equal relation between the valuation of property in each borough and throughout the entire city," the *Record and Guide* endeavored to obtain for its readers a description of the working process by which this was to be brought about. The immense amount of work thrown on the tax department by the charter made it for a long time impossible for any of its officials to afford the time to supply the necessary information. Since then other causes of delay have crept in, among them the determination of the department not to make any statement that could be construed into an answer to criticisms of their work or in any way place them in a controversial position. Now, however, the *Record and Guide* is able to describe the process of valuing real property for tax purposes through the courtesy of the tax department.

What has to be determined is whether the department has a system based upon accurate knowledge of values, or whether the deputies make haphazard calculations, or are swayed by political and personal preferences. Whether, as some infer, New York realty runs the danger of being unfairly assessed as compared with its neighbor, or whether the assessments are really equitably and equally made. In the opening conversation with a *Record and Guide* representative, President Feitner said: "You must get rid of the idea, if you have it, that the department recognizes any
180 percentage of value which is to be taken as a maximum value for tax purposes. The 75 per cent. of value the public has in mind is purely fictitious. What we endeavor to arrive at is the fair market value of the property, what it could reasonably be expected to sell for readily if placed on the market, and the difference between the ultimate results of our calculations and the amount placed in the assessment-rolls is brought about by the considerations necessary to maintain this position."

Mr. Frank J. Bell, chief deputy having charge of the real estate, who was present, said further: "The system finally adopted by the department for ascertaining values was based upon its work and experience of a good many years, and that it produces equable results can be demonstrated in most of the sales, as recorded, that have taken place in the past year. Errors will creep in occasionally, but these are rectified as soon as discovered. For instance, an unusual raise of value ($30,000 to $60,000) on a small property, No. 18 Mercer street, was made. This was a clerical error, and on the application of the owner, made April 11, 1899, and acted upon by the com-

missioners May 26, was reduced to the original assessment, $30,000. The same may be said of the property at the northeast corner of Ann street and Theatre alley, raised from $36,000 to $90,000, and on the application of the owner, dated April 4, 1899, reduced to $70,000 on May 24, by the commissioners.

"The system of arriving at valuations is: In regard to the land to employ the ordinary methods of the experts, taking size (p. 636), adaptability to use, recorded sales of that and similar parcels into consideration; and, in regard to buildings, to employ factors of value of so much per square foot of floor surface that the experience of the department has shown to be fair. These for tenements run from for a common one $1.25 to $2 for a flat; for stores of good class, with iron front they will run to $2.50. When it comes to steel construction buildings, the lowest factor of value is $3, and that only for a mercantile steel construction building; for modern office
181 buildings this factor of value runs from $4 to $8 per square foot of floor surface. Consequently, the deputy has, besides the well-known means of determining the values of land, the factors of building values, ranging from $1 for nominal values to $8 per square foot of floor surface. A builder would determine the cost of a building by a careful examination of the amount of material used in construction, with the aid of plans and specifications, the cost of labor and a consideration of the difficulties to be overcome. An assessor cannot enter into such calculation, because he has not the plans and specifications, nor has he the time. The cost may also be otherwise determined by an architect, who knows the height of the building in feet, by estimating its cubic contents, and using such a factor per cubic foot as his judgment tells him such a building will cost. The deputy cannot avail himself of this plan, because he cannot ascertain promptly the height of a building in feet. He can, however, easily count the stories, his map gives him the square feet of land, which he multiplies by the stories, and this product by his factor for square foot of floor surface, thus arriving at the value. His selection of the proper factor is guided by an exterior and interior examination of the building, to ascertain materials used and style and kind of trim and finish.

"Let us see how these rules work out on the block fronting on the west side of Broadway, between Dey and Fulton streets. This block contains the 'Mail and Express' and 'Western Union' buildings, the former of which was increased from $500,000 to $650,000, while the latter was not increased at all. A sketch is submitted which is a copy of the tax map. For the purposes of comparison let us suppose that an inside lot on Broadway, at this point, is worth $80 per square foot. The corners are worth 50 per cent. additional or $120, and the southwest corner, which faces an open place, is probably worth more, say $130, while property down the block, on either Fulton or Dey streets, connected with Broadway, may be worth $50 per square foot. With these prices in view, let us figure out
182 some of the values on this frontage. If the above prices are not the real values in every one's judgment it will not matter

in the process of equalization between the 'Mail and Express' and the 'Western Union' buildings, because they are alike affected:

17 x 96.10; 1,662 sq. ft. x $130	$216,000
Building is 6 stories, and old	25,000
Total value	$241,000
Assessed value raised from $160,000 to	180,750
Value as recorded in sale made in 1888	$226,250

No. 203 Broadway—Mail and Express building.

2,475 sq. ft. on Broadway x $80	$198,000
4,422 sq. ft. on Fulton street x $50	221,100
6,897 sq. ft., land value	$419,100
10 stories, 68,970 sq. ft. floor surface x $7	482,790
Total value	$901,890
Assessed value raised from $500,000 to	550,000

No. 195 Broadway—Western Union building.

2,500 sq. ft. northwest corner Dey street x $120	$300,000
5,033 sq. ft. on Broadway x $80	402,640
8,100 sq. ft. on Dey street x $50	405,000
15,633 sq. ft. land value*	$1,107,640
11 stories; 171,693 sq. ft. floor surface x $5.50	945,590
Total value	$2,053,430
Assessed value same as in 1898	1,500,000

183 Now, let us consider the block on the easterly side of Broadway, containing the "St. Paul," the "Park bank" and the "Knox" buildings, of which a copy of the tax map is also given. The deputy considered this side of Broadway much more valuable per square foot, fixing the Fulton Street corner at $175, the inside at $120, the Ann Street corner at $200 per square foot and the rear property, connected as it is with Broadway parcels, at $50 per square foot.

*The land was purchased in separate parcels in 1872, 1880, 1880 and 1890, as per "Record and Guide," for a total of $1,807,000.

(Diagram.)

St. Paul building.

2,500 sq. ft. southeast corner Ann street x $200	$500,000
3,200 sq. ft. Broadway x $120	384,000
5,700 sq. ft., land value	$884,000
5,700 sq. ft. x 18 stories=102,600 sq. ft.; 1,560 sq. ft. x 7 stories=10,920 sq. ft.; total surface of 113,520 sq. ft. x $8=	908,160
Total value	$1,792,160
Assessed value, 1898, $1,000,000; raised to $1,500,000; reduced to	1,300,000

† Northeast corner Broadway and Fulton—Knox building.

2,208 sq. ft. x $175	$386,400
Building, old	20,000
Total value	$406,000
Assessed in 1898 at $175,000; raised in 1899 to	275,000

184 Broadway—Park bank.

5,933 sq. ft. on Broadway x $120	$711,960
2,360 sq. ft. rear on Ann street x $50	118,000
8,293 sq. ft. land value	$829,960
Building: 5 stories; 41,465 sq. ft. floor surface x $4	165,860
Total value	$995,820
Assessed value, not raised in 1899	750,000

The block on the westerly side of Broadway, between Barclay street and Park place, is another typical case. The corners may be considered worth $120 per sq. ft., the inside $75 per sq. ft. The buildings are quite unimportant in value, varying, perhaps, from $1 to $2 per sq. ft. of floor surface. The map given herewith like the two given above is copied from the tax map.

† This property has a record of sale in 1893 to E. M. Knox (a part interest only) for $392,000. The deputy probably dropped below the mathematical figure, because the property is hemmed in by the Park Bank holdings and is not large enough for the erection of a modern high building.

(Diagram.)

(Page 637)—No. 229 Broadway.

2,500 sq. ft. on northwest corner of Barclay x $120	$300,000
2,100 sq. ft. on Broadway x $75	157,000
2,600 sq. ft. on Barclay x $50	130,000
7,200 sq. ft. land value	$580,000
Building, 6 stories; 43,200 sq. ft. floor surface x $125, say	50,000
Total value	$637,000
Assessed value 1898, $425,000; raised 1899 to	478,000

185 No. 231 Broadway.

3,000 sq. ft. x $75	$225,000
Building, 6 stories; old	20,000
Total value	$245,000
Assessed value 1898, $130,000; raised 1899 to	180,000

No. 223 Broadway.

2,250 sq. ft. x $75	$168,750
Building, 5 stories; old	10,000
Total value	$178,750
Assessed value 1898, $80,000; raised 1899 to	125,000

No. 234 and 235 Broadway.

4,200 sq. ft. x $75	$315,000
Building, 7 stories	50,000
Total value	$365,000
Assessed value 1898, $202,000; raised in 1899 to	275,000

No. 237 Broadway, southwest corner Park place.

3,150 sq. ft. x $120	$378,000
Building, 7 stories x $2	44,000
Total value	$422,000
Assessed value not raised in 1899	325,000

Mr. PAGE: That is all we wanted to ask Mr. Bell.

Mr. COMAN: We now renew our motion to strike out all of the evidence relating to the examination of Mr. Feitner before the Mazet committee.

The REFEREE: I strike out the evidence given by Mr. Feitner before the legislative committee.

186 Mr. COMAN: Also the witness' answer that he afterward heard Mr. Feitner had given such testimony?

The REFEREE: Yes.

Plaintiffs except.

Redirect examination.

By Mr. COMAN:

Q. Is there any explanation that you desire to make concerning the figures and tables contained in this statement from the "Record and Guide;" if so, you may proceed to make it?

Objected to as too broad.

Q. What is the fact as to the figures in this statement purporting to give the true value of the various pieces of property referred to; from what were those derived and what do they represent actually?

Mr. HILL: What figures are you referring to?

Mr. COMAN: The figures which purport to give the true value of the pieces of real estate referred to in this article.

A. The first tables are tables of comparison, not necessarily of value, although they are based on values.

Q. You refer now to those at the foot of page 636?

A. Yes; this was a comparison.

Mr. HILL: Don't it show for itself what it is?

A. Yes, sir.

Mr. HILL: Then what is the object of any explanation?

Q. Proceed, unless the referee tells you not to?

The REFEREE: It is not necessary for him to testify to anything that appears there.

Mr. COMAN: He isn't doing any such thing.

187 The REFEREE: If those figures are not true, that is what we want to get at, say so.

The WITNESS: I say, these figures of valuations are not mine.

Q. Whose are they; from what source did you procure them?

A. From recorded sales; I give no estimate of value; I only give a comparison of value in the statement here.

By the REFEREE:

Q. Those are the figures obtained from the recorded sales the same as the figures you have produced here to-day?

A. Yes; except those are verified and these are not.

Q. We assume they are a correct transcript from the recorded sales; the figures you produce here to-day are correct transcripts from the recorded sales?

A. Yes, sir.

The REFEREE: You have the same standard, then, in both cases. Now, is there anything the matter with those figures that you want to explain. Put any question you desire.

Mr. COMAN: I will adopt your honor's question.

The WITNESS: I see nothing I want to explain about that.

Mr. COMAN: Simply the figures do not represent your estimate of values, but the recorded sales, the same as the statement that you have produced to-day.

The REFEREE: That is true; the same standard in both cases.

Mr. COMAN: In the statement submitted to-day are you familiar with the values of the property referred to in this statement as distinguished from the sales price?

188 The REFEREE: In order to make the answer of any value did you examine into the various parcels of real estate to see what the real value was aside from the sales price?

A. To some extent.

Mr. COMAN: As to what particular pieces of properly and what examination did you make; what investigation did you make—I don't think I will go into that now; I withdraw that question.

The WITNESS: In the paragraph preceding the figures given on page 637 is a reference to value, supposing a value per square foot; it is not given as an actual value; those figures recur in the statement below.

By Mr. PAGE:

Q. Those are the values, are they not, which are in that part of the article which has been offered in evidence by the attorney-general?

A. I don't know whether I understand which has been.

Q. The figures offered in evidence on behalf of the plaintiffs occur at the end of your article; is your present comment designed to refer to that part?

A. My attention was drawn to the figures on the preceding page to that.

Q. Which were offered in evidence by the attorney-general?

A. Yes, sir.

Mr. COMAN: You started to say something about the last figures.

Mr. BROWN: He don't want to explain what he put in himself.

The WITNESS: The figures in the paragraph, the prices per square foot for land given in the last paragraph on page 636 are not intended as real values, they are only given as figures for the

189 purpose of comparison, illustration; the article says, "For the purposes of comparison, let us suppose that an inside lot at this point is worth $80 per square foot;" I wanted to say that is

not necessarily my judgment of the value of the land there, just as the article intimates.

By Mr. BROWN:

Q. It might be worth more?
A. Yes, or less.

By Mr. PAGE:

Q. The part of the article offered in evidence by the plaintiffs appears on page 637, does it not?
A. Yes.
Q. You make no assessment personally, do you; they are all made subject to the approval of the board?
A. No, I make no assessments personally.

By Mr. COMAN:

Q. Nobody makes any assessment personally; the assessments are made by the board as a board?
A. No, sir; the deputies make the assessment.
Q. The deputies fix the valuations?
A. Yes, sir.
Q. The assessment is the action of the board, is it not?
A. The assessed values are placed by the deputies, the actual tax is fixed by the board of aldermen and municipal assembly.

By Mr. BROWN:

Q. The deputies actually swear to the assessments?
A. Yes, sir.

By Mr. PAGE:

Q. The deputies personally view the property, do they not?
A. Yes, sir.

190 By Mr. BROWN:

Q. A statute requires them to make an oath that they have assessed it?
A. Yes, sir.

Defendants rest.

FREDERICK G. HOBBS, recalled by plaintiffs in all the cases:

Examined by Mr. PAGE:

Q. You have read Mr. Bell's direct examination in this proceeding, have you not?
A. Yes, sir.
Q. You have, during the last two weeks, made a study of the statements which are contained in a document which has been referred to by Mr. Bell in his testimony as the list being the statements

which were prepared by Mr. Bell prior to coming on the stand as a statement of his views on this branch of the case?

A. Yes, sir.

Q. Have you, as a result of your investigation and the result of personal examination of transfers of property, prepared a statement containing statistics and stating various circumstances which controvert to a certain extent the statements made on Mr. Bell's direct examination?

A. I have.

Q. Will you please read the statements?

The witness reads the statement as follows:

"The seventy-three transfers of property cited by me in my testimony, which Mr. Bell criticised, were actual sales, requiring more or less negotiation to make the minds of the buyer and seller agree, and that the prices or values quoted were the real values at that time. These seventy-three illustrations were not selected as a special list.

"I find in Mr. Bell's testimony a total of forty-five illustra-
191 tions of transfers of property; twenty-seven of these forty-five were sales at auction, twenty-one of the twenty-seven auction sales were sold under foreclosure, fifteen of the twenty-one sales bid in by the plaintiff; of the twenty-seven auction sales, four were executors' sales, and two of the properties, viz., 153 and 155 Spring street, and 1680–1684 Broadway, were bought in by heirs of the estate, evidencing that the outside bidders were not willing to pay the value of the property and still Mr. Bell uses these figures as a basis in arriving at percentages on these two properties of 92 per cent. and 93 per cent. And two illustrations have street numbers which do not exist, viz., 234 West Eighty-eighth and 180 and 182 West One hundred and twenty-fifth. The assessed value of four of the properties sold at auction was reduced in 1900 by the tax commissioners, *i. e.*, 49–55 West Twenty-seventh street was reduced from $365,000 to $325,000, or 80.125 per cent. of the price, $400,000, which it was sold for at public auction under foreclosure. On December 26, 1900, this same property was sold at private contract by the buyer at auction to Frank N. Gill. The revenue stamps on deed were $700—indicating that the property was sold for a consideration of $700,000—assuming this as a basis of value, the percentage of assessed value to real value is 46.43 per cent. On September 18, 1900, he gave a mortgage on the property to the City Real Estate Company of $400,000 at 4½ per cent., the subsequent sale and mortgage to the sale of foreclosure indicate clearly that the price bid at auction was not a fair value for the property.

The assessed value of 238 East Forty-fifth street, was reduced in 1900 from $10,000 to $9,000, or 100 per cent. of the price which it sold for at public auction under foreclosure. March 2, 1897, a mortgage was made on it for $11,000 at 5 per cent. March 6, 1897, it was sold subject to mortgage of $11,000 for an expressed consideration of $18,250, which makes the assessed value of 1900 50 per cent.

of the selling price. August 14, 1897, it was sold, and ex-
192 pressed consideration was $18,000, which also makes assessed value of 1900 50 per cent. of the selling price. March 4, 1898, a mortgage was made for $12,500 at 5 per cent. June 18, 1898, was sold subject to a mortgage of $12,500 and the expressed consideration was $17,500, which also makes the assessed value of 1900 about 50 per cent. of the selling price. February 4, 1899, was sold at foreclosure, amount due being $14,409.40 and was bid in by the plaintiff for $9,000—which, in view of the previous history of the property, would not indicate that it sold for anything like its real value, and therefore that the percentage of assessed value to price in record of transfer of February 4, 1899, is not a fair conclusion.

I find an error in Mr. Bell's testimony as to the assessed value of No. 230 West One hundred and thirty-first street. He represents it as $10,000, and I find it to be $5,500, which is 55 per cent. of the price which it sold for September 27, 1899.

No. 22 Chatham square, referred to by Mr. Bell as being assessed in 1899 for $11,000, and selling April 13, 1899, for $12,500, or 88 per cent., I will add further; it sold August 30, 1899, the revenue stamps on deed were $18, indicating consideration as $18,000, or 61.11 per cent. August 30, 1899, premises were mortgaged for $12,000 at 4½ per cent., five years.

No. 67 Wall street, referred to by Mr. Bell, assessed at $210,000 in 1899, and sold for $180,000 September 25, 1899.

Nos. 386 and 388 West Broadway, referred to by Mr. Bell, assessed at $50,000 in 1899, and sold for $48,500 May 12, 1899.

No. 320 Riverside drive, referred to by Mr. Bell as assessed in 1899 for $75,000, and sold May 10, 1899, for $77,500. I find the sale of May 10, 1899, and the consideration in the deed was $77,500;
193 the amount expressed in the deed of May 10, 1899, is only about the value of the land, and in addition thereto is a very handsome dwelling on the land.

No. 5 West Twenty-second street, referred to by Mr. Bell, assessed at $80,000; record of transfer June 2, 1899; consideration, $90,000. I find on June 2, 1899, a deed of March 23, 1883, was re-recorded, and the consideration in deed of June 2, 1899, must have been the same as the deed of March 23, 1883, or the value of that date. A conservative estimate of the value of No. 5 West Twenty-second street (being 54 feet by 98.9) would be $160,000, which would make the assessed value of $80,000 of 1899 50 per cent. of the actual value. To substantiate my value on No. 5 West Twenty-second street, I quote the sale of No. 13 West Twenty-second street, dated December 28, 1899, 27 x 98.9, 4-story stone front dwelling, $82,500, and No. 15 West Twenty-second street, dated June 19, 1900, 26.2 x 98.9, 4-story stone front dwelling, price, $110,000. These figures are equivalent to about $3,000 per front foot, which is the rate of valuation given to No. 5 West Twenty-second street, at $160,000.

Northeast corner of Riverside drive and Eighty-fourth street, referred to by Mr. Bell, assessed $64,000, 1899, sold for $60,500, March 8, 1899. I find the following to be the case: The northeast corner

of Eighty-fourth street and Riverside drive (57.4 x 102 x 52.2 x 79) was sold March 8, 1899, by Patrick Callaghan to William R. and James R. Stewart, for $60,500. This plot is assessed for $28,000, and not $64,000, as represented by Mr. Bell. By way of explanation, however, would say that the entire property, comprising a little over five lots, was assessed for $64,000; therefore the relation of the correct assessment of $28,000 to the selling price of $60,500 is 46½ per cent., and not 105 per cent., as represented by Mr. Bell.

Mr. Bell refers to the northwest corner of Central park, west,
194 and Ninety-first street, assessed value, $140,000, 1889, sold May 17, 1899, for $150,000. I find the northwest corner of Ninety-first street and Central park, west (100.8 x 120) was sold by Julius Oppenheimer to Isabelle Loring on May 17, 1899, for $150,000. I also find by an examination of the books in the tax department that the entire block front on Central park, west, from Ninety-first street to Ninety-second street, being practically twice the size of the plot referred to by Mr. Bell, was assessed, in 1899, for $140,000; therefore by dividing the assessment and putting one-half of it on each one-half of the block, it would reduce the assessed value to $70,000, which is 46⅔ per cent. of the selling price of the northwest corner of Central park, west, and Ninety-first street, May 17, 1899.

No. 19 East Fifty-sixth street referred to by Mr. Bell as assessed $46,000 in 1899; conveyed October 2, 1899; consideration, $50,000. I find this property conveyed to Jesse E. Carpenter, May 9, 1896, consideration, $65,000, which makes the assessed value of 1899 about 71 per cent. of the consideration expressed in deed of May 9, 1896. The transfer of October 2, 1899, was from Jesse F. Carpenter to Elizabeth Ten Eyck Carpenter. This property is now worth about $100,000. On this basis the assessed value of 1899 is about 46 per cent. of the present value.

No. 14 East Tenth street, referred to by Mr. Bell as assessed 1899 for $18,000, record of conveyances February 27, 1899, $19,240. This conveyance was made by Howard H. Henry *et al.*, executors, etc., of Frank L. Henry to Julia H. and Ambrose D. Henry, $19,240. On December 27, 1899, the owners of record of that date gave a mortgage on this property to the Equitable Life Assurance Society of $20,000 at 4½ per cent. On April 12, 1899, No. 22 East Tenth street, a three-story house (on same size plot as No. 14 East Tenth street, 25 by 92.3) was conveyed and the consideration expressed was $30,000, therefore, on a basis of the mortgage placed on the
195 property by the Equitable Life and the conveyance of No. 22 East Tenth street April 12, 1899, it is my opinion that the value of No. 14 East Tenth street, at the time of transfer, was $30,000, which would make the assessed value as 60 per cent. of the real value.

No. 232 West Fifteenth street, referred to by Mr. Bell as assessed 1899, $7,000, record of transfer April 17, 1889, $8,000. I find this property conveyed by Daniel H. Smith to Pierson W. Smith February 2, 1901. No. 224 West Fifteenth street, a similar house, was conveyed at an expressed consideration of $15,000 February 9, 1901.

No. 214 West Fifteenth street, a similar house, was offered for sale at auction and bid in by the parties in interest at $15,450. It is my opinion that the real value of No. 232 West Fifteenth street in 1899 was $14,000, which makes the assessed value 50 per cent. of the value of the property.

North side One hundred and sixty-seventh street, 77.3 west of Audubon avenue (and not west of Amsterdam avenue, as there is no such conveyance) assessed 1899 for $5,500, record of transfer February 2, 1899, $60,000. I find the above a record of conveyance and further find a mortgage of $5,000 at 5 per cent. recorded, given by the buyer at foreclosure February 2, 1899, to Frederick P. Sands, trustee, under deed of trust by Frederick Parker Sands. I am familiar with the property and believe the lot to be worth $4,000, and the house on the lot to be worth $5,000, aggregating a total value of $9,500, which is 60 per cent. assessed value to the real value. My valuation is substantiated by the amount of loan B. & M. made to said Sands subsequent to the sale at foreclosure.

No. 119 Baxter street, 25 by 100, a 6-story brick store and tenement with 5-story brick tenement in rear, referred to by Mr. Bell, assessed 1899, $16,000; consideration expressed in deed July 8, 1899, $17,100. I also find a mortgage given on said property by the purchaser of July 5, 1899, of $15,000 at 3½ per cent., for five years.
196 It is, therefore, conclusive that the expressed consideration of $17,100 was for the equity above mortgage of $15,000, making a total value of the premises, $32,100, or 50 per cent. assessed value to the real value. To further substantiate this valuation I quote sale of December 22, 1899, No. 93 Baxter street, 25 by 100, 2-story frame store and tenement, 3-story brick tenement in the rear, at an indicated price of $22,500, revenue stamps $22.50.

Nos. 277 and 279 West One hundred and twenty-seventh street, referred to by Mr. Bell, assessed value, 1899, $30,000, record of transfer, December 6, 1899, $30,000. I find that the record referred to by Mr. Bell was not a deed, but the record of a contract of sale which was released of record January 8, 1900, and that the property was conveyed December 9, 1899, at an indicated consideration of $40,000, or 75 per cent. of the assessed value to real value, and was again conveyed June 25 1900, at an indicated consideration of $45,500, or 66⅔ per cent. assessed value as to real value.

One hundred and fortieth street, south side, 100 feet east of Amsterdam avenue, referred to by Mr. Bell, assessed, 1899, $——; record of transfer, March 9, 1899, $5,000, May 24, 1899. This lot was mortgaged by the owner to American Manufacturing Company for $5,000, June 2, 1899; was further mortgaged for $1,000; June 15, 1899, lot was sold to Walter D. Starr, subject to mortgages, for $6,000. This lot, in my opinion, was reasonably worth $7,500 in 1899, which makes the assessed value 60 per cent. of the real value.

No. 800 Lexington avenue, referred to by Mr. Bell, assessed, 1899, for $14,000; record of transfer, May 16, 1899, $15,000. I find record of transfer of the property, April 27, 1898, consideration expressed,

$30,000, or 49 per cent. assessed value, 1899, to real value, 1898; April 27, 1898, mortgage was placed on this property of $16,000, at 5 per cent., to Joseph Louchheim; May 16, 1899, under fore-
197 closure, premises sold to plaintiff, said Louchheim, for $15,000, and there was then due on the B. & M. $17,356.55; May 16, 1899, property conveyed subject to mortgage of $16,000, at 4½ per cent. for five years, made to said Louchheim. It is my opinion that the foreclosure sale of May 16, 1899, quoted by Mr. Bell, was not the real value, as is evidenced by the mortgage made on said premises of $16,000, at 4½ per cent., and the immediate resale.

No. 446 East Seventy-second street, referred to by Mr. Bell, assessed, 1899, $4,500; record of transfer, January 9, 1899, $4,600. I find May 29, 1899, said property was bought from the purchaser at foreclosure sale of January 9, 1899, at an expressed consideration of $2,500 above a mortgage of $3,500, or an indicated valuation of $6,000, which is 75 per cent. assessed value as to real value, and on January 12, 1900, owner of record placed a new mortgage on said premises of $5,000, at five per cent.

No. 32 West Sixty-sixth street, size 25 x 100.5, with 5-story brick flat, referred to by Mr. Bell, assessed, 1899, for $10,000; record of transfer foreclosure March 8, 1899, $10,000, to the plaintiff. In my opinion the lot without any improvement in 1899, was worth $15,000, or 66⅔ per cent. of assessed value to real value.

No. 285 West One hundred and forty-seventh street, referred to by Mr. Bell, assessed $12,000; record of transfer October 12, 1899, $13,500. I find that the buyer of the premises at foreclosure sale gave a mortgage October 12, 1899, to United States Trust Company of $11,000, at 4½ per cent., in my opinion the loan of $11,000 as 60 per cent. of the real value of the property.

Nos. 516 to 522 West Thirty-fifth street, referred to by Mr. Bell, assessed in 1899 $38,000; recorded transfer, May 1, 1899, $41,000. I find a record of transfer December 20, 1898, consideration expressed, $50,910, which is 76 per cent. assessed value, 1899, to ex-
pressed consideration, December 20, 1898; also record of
198 transfer, January, 1900, consideration expressed, $47,842, which is about 80 per cent. assessed value, 1899, as to expressed consideration, January 9, 1900.

I hereby summarize, as far as examined, the transfers submitted by Mr. Bell, with percentage arrived at by him, showing him to be in error, as follows:

Property.	Bell's per cent.	Correct per cent.
5. 49-55 W. 27th	91 per cent.	46.43 per cent.
6. 228 E. 45th	111 "	50 "
7. 367 W. 56th	100 "	89 "
8. 2109 2d Av.	87 "	81 "
9. 230 W. 131	100 "	55 "
10. 22 Chatham Sq.	88 "	61.11 "
11. 67 Wall St.	116 "	77 "
12. 386 and 388 W. B'way	103 "	83.33 "
13. 320 Riverside	97 "	51 "
14. 5 W. 22d	89 "	50 "
15. Riv. and 84th	105 "	46 1-2 "
16. C. P. W. and 91st.	93 "	46 2-3 "
17. 19 E. 56th	92 "	46 "
18. 14 E. 10th	93 "	60 "
19. 232 W. 15th	87 "	50 "
20. N. S. 167th St.	91 "	60 "
21. 119 Baxter	93 "	50 "
22. 277 and 279 W. 127th	100 "	66 2-3 "
23. 140th St., near Ams	80 "	60 "
24. 800 Lexington Av.	90 "	49 "
25. 446 E. 72d	98 "	75 "
26. 32 W. 56th	100 "	66 2-3 "
27. 285 W. 147th	88 "	60 "
28. 516 to 522 W. 35th	92 "	76 "

1. 153 and 155 Spring, exr. sale bid in by heir.
2. 1680, 1684 B'way, " " "
4. 180-182 W. 125th, no such number.
3. 234 W. 88th, " "
No card, 210 B'way. No such conveyance.

Referring to the corner of Second avenue and Seventy-second street, referred to in my former testimony, having been sold for $49,000 and being assessed for $14,000, assessed value to actual value, 28.571 per cent. To correct that, the size of the property, 50 by 102.2 is 59 by 102.2, making a difference of 9 feet in the assessed value: therefore if 50 feet was assessed at $14,000, 59 feet should be assessed $16,520, which would increase the percentage of assessed value to 33.71 per cent., and not 28.571 per cent., as quoted before.

199 *Hearing.*

THOMAS C. SMITH, sworn for the plaintiffs in all cases:

Examined by Mr. PAGE:

Q. Where do you reside?

A. No. 57 East Seventy-sixth street, borough of Manhattan: my place of business is No. 111 Broadway.

Q. Will you state your experience in the real estate business and qualifications to testify as an expert as to the value of real estate in the city of New York?

A. I wish to state my business: I am a real estate broker, appraiser and auctioneer; have been engaged in that business for nearly sixteen years; my place of business has always been No. 111 Broadway; I have appraised and testified for the city in many condemnation proceedings; that is, to acquire land and buildings under the condemnation proceedings for park, street openings, school sites; I have also appraised for individuals, estates, lawyers; I have bought and sold property on Manhattan island from Stone street to Two hundred and ninth street, and have also appraised all over the borough of Manhattan; I have a system of block books showing the date of the last conveyance, the consideration as mentioned in the deed and the name of the grantee of every parcel of land on Manhattan island that has been conveyed subsequent to March 22, 1868; I also have a card system.

The REFEREE: I guess we will assume you are qualified.

By Mr. HILL:

Q. No. 111 Broadway is the headquarters of the Real Estate Exchange?

A. Yes, sir; the real estate sales-room.

Q. All take place there?

A. Yes, sir.

By Mr. PAGE:

Q. Have you prepared a schedule of parcels of property
200 which have been recently the subject of sales in the various eight sections into which the island of Manhattan is divided?

A. I have.

Q. The dates when these transfers of property took place were a short time before, or a short time after the second Monday of January, 1900, were they not?

A. Yes, sir.

Q. In these eight schedules which you have prepared appear columns headed "Assessed valuation," "Date," "Record of transfer," and the percentage which the assessed valuation constitutes of the consideration which has been found by you to be expressed in the record of transfer?

A. Yes, sir.

Q. Will you state in what way you prepared these statistics which are contained in these tabulated statements referring severally to the eight sections?

A. I have a card system arranged according to the section and block numbers of Manhattan island, and I have in the limited time run through these cards, looked them over and jotted down the conveyances, the date and the consideration mentioned in the deed; afterwards I have gone to the tax office and obtained the tax valuation of 1900 and then figured out the percentage that the tax valuation bears to the selling price; then I have added up the totals and

have shown the average percentage that the tax valuation bears to the selling price.

Q. The assessed valuation?

A. Assessed valuation; we always speak of it as the tax valuation bears to the selling price in sections 1, 2 and 4; the others I did not have sufficient time to look over the tax books and get the tax valuation.

Q. In preparing these tabulations, have you considered at all the assessed valuation before making up your list?

A. Oh, no; I didn't know about the assessed valuation until afterward.

Q. That is to say, you have made up your list of specific parcels of property without any reference whatsoever to the assessed valuation of the same?

201 A. Absolutely irrespective of the assessed valuation in the first instance.

By Mr. BROWN:

Q. Then you have gone to the tax books and found the assessed valuations of the property you had selected in that way?

A. I have.

By Mr. PAGE:

Q. I show you the schedules to which you have referred and ask if these are the papers which have been prepared by you on the basis stated, and whether the statements contained in the same are correct?

A. Yes, sir; those are the papers and the statements are correct.

By Mr. FIERO:

Q. You say you compared the assessment of 1900; what assessment do you mean, the assessment became fixed at what time?

A. The tax valuation of the year 1900, or the assessed valuation of 1900, decided upon in January, 1900.

By Mr. PLATT:

Q. Assessed as of the second Monday of January, 1900?

A. Yes, sir.

Mr. PAGE: We offer in evidence eight tabulated statements prepared by Mr. Smith showing with respect to the eight sections into which the island of Manhattan is divided a comparison between assessed value and selling value in the cases stated.

Defendant's counsel objected as immaterial, incompetent and not properly proven, and objected specifically to the sales and comparisons appearing where the transfer was later than the second Monday of January, 1900, that being the date of the assessment. And

202 upon the ground that a very large proportion appears to be of a later date so far as the record of transfer is concerned.

Objection overruled; exception.

Q. Will you state whether, in your opinion, the sales which are referred to in these various tabulations are fair standards of the relation between actual and selling value in the various sections of the city?

A. I consider that they are typical examples; yes, sir.

Cross-examination.

By Mr. COMAN:

Q. In preparing this schedule, did you take all of the sales in the various districts between certain dates?

A. No; not all of the sales.

Q. Why not?

A. Because I didn't have the time.

Q. In making your selections what course did you pursue?

A. In making my selections I pursued this course, to take something on Broadway, for instance, in section one, the Trin-ty building, No. 111 Broadway, Liberty street, Front street, Hester street Cherry street, Greenwich street, so as to show that the same proportion or ratio would exist in different districts and different streets.

Q. You took what you regarded as representative transactions?

A. Yes, sir.

Redirect examination.

By Mr. BROWN:

Q. When you took those properties that you have mentioned you had no knowledge what the assessment was?

A. None whatever.

By Mr. PAGE:

Q. In any case?

A. No, sir.

203 The following is a copy of the tabulated statements:

Section 1.

	Assessed value.	Record of transfer.		Percentage.
37 Front St	$6,000	July 12, 1900	$12,700	47
28½ and 30 Front St	18,000	Jan. 30, 1899	26,000	69
114 and 116 Liberty St. and 119 and 121 Cedar St.	72,000	Feb. 15, 1900	275,000	26
109 and 111 Broad St. and 24 Front St	18,000	Jan. 19, 1900	80,000	22
10 Broadway	140,000	Aug. 1, 1900	250,000	56
111 Broadway	850,000	May 26, 1899 (1-3)	475,000 1,425,000	59 Whole.
139 Broadway	150,000	May 31, 1900	333,000	45
155 and 157 Broadway	300,000	May 1, 1900	500,000	60
255 Pearl St.	24,000	Oct. 28, 1899	60,000	40
191 William St.	18,000	May 29, 1900	32,000	56
215 and 219 William St. and 12 to 16 North William St.	28,500	Mar. 27, 1900	37,500	76
23 Park place and 29 Murray St.	130,000	July 24, 1899	170,000	77
89 and 91 Warren St.	21,000	Ap'l 2, 1900	35,000	60
156 Reade St	12,500	Jan. 4, 1900	18,000	69
147 W. Broadway	25,000	Nov. 17, 1899	36,000	70
487 Pearl St. and 38 City Hall place	15,000	Dec. 26, 1900	21,000	71
5 and 7 Franklin St.	22,500	May 10, 1900	46,500	48
353 to 357 Broadway	390,000	Mar. 1, 1900	413,000	94
339 Greenwich St.	18,000	July 18, 1899	27,000	67
46 Harrison St.	11,500	Ap'l 19, 1900	15,000	77
68 James St.	12,000	Mar. 1, 1899	23,250	52
130 Madison St.	12,000	Feb. 1, 1899	23,000	52
25 East Broadway	7,000	May 14, 1900	19,175	36
6 Rutgers St.	16,000	Feb. 1, 1899	32,500	49
162 East Broadway	11,000	Jan. 16, 1900	25,000	44
59 and 61 Elizabeth St	14,500	Jan. 18, 1900	23,000	63
137 Hudson St.	12,000	Dec. 11, 1899	16,500	73
446 Washington St.	4,500	Oct. 21, 1899	11,000	41
439 Canal St.	6,000	Nov. 29, 1899	13,500	45
161 Hester St.	14,500	Nov. 13, 1899	30,000	48
156 Cherry St.	7,000	Mar. 28, 1900	10,450	67
				1759

Average, 56 13-31 per cent.

204 Section 2.

	Assessed value.	Record of transfer.		Percentage.
36 Goerck St.	$7,000	Aug. 29, 1899	$13,500	51
65 Broome St	20,500	Ap'l 19, 1900	33,500	60
131 Cannon St.	9,000	Mar. 1, 1900	15,600	58
474 Grand St.	10,000	Nov. 13, 1899	22,600	44
24 Ave. D	7,000	Sept. 26, 1899	12,500	56
284 Third St.	15,000	June 13, 1900	26,650	56
386 Eighth St.	6,000	Jan. 6, 1900	15,000	40
Avenue C, N. E. cor. 7th St.	19,000	Aug. 3, 1899	25,000	76

	Assessed value.	Record of transfer.		Per-centage.
254 Fourth St.	$7,000	Sept. 25, 1900	$17,600	40
619 East 9th St.	7,500	Mar. 1, 1900	17,500	43
252 Houston St.	25,000	Feb. 15, 1900	48,000	52
186 Second St.	15,500	Feb. 15, 1900	27,500	56
297 East 10th St.	13,500	Apr. 26, 1900	21,500	63
543 East 11th St.	6,500	Dec. 29, 1899	16,250	40
141 Bowery	19,000	Oct. 31, 1899	35,100	54
163 Bowery and 133 Chrystie St.	28,000	Oct. 25, 1899	66,850	42
68 St. Mark's place	14,500	Mar. 29, 1900	24,050	60
200 Mott St.	10,500	Nov. 21, 1899	18,750	56
516 and 518 Broome St.	16,500	Nov. 23, 1899	25,000	66
193 Spring St	7,000	Jan. 3, 1900	12,500	56
14 and 14½ Charlton St.	11,000	June 5, 1899	23,500	47
604 to 608 Broadway.	225,000	Mar. 12, 1900	319,500	70
146 to 154 Thompson St. and 474 to 478 West Broadway	98,000	Nov. 17, 1899	147,500	66
34 and 36 Houston St.	28,000	Mar. 1, 1900	35,500	79
190 Bleecker St	11,500	Mar. 1, 1900	18,000	64
215 Thompson St.	9,500	Jan. 3, 1900	17,000	56
108 Macdougal St	18,500	Jan. —, 1900	29,500	63
110 and 112 Sixth Ave.	39,500	Ap'l 23, 1900	55,000	72
31 and 31½ West 12th St	15,000	Feb. 27, 1900	25,000	60
118 West 13th St.	12,000	Sept. 9, 1899	18,000	67
158 to 160 West 14th St. and 53 Seventh Ave.	24,000	Ap'l 26, 1900	65,000	37
241 West 4th St.	8,000	Nov. 16, 1899	11,500	70
				1820

Average, 56 7-8 per cent.

205 Section 3.

	Assessed value.	Record of transfer.		Per-centage.
527 and 529 West 32d St.	$12,500	Feb. 1, 1900	$20,000	62
123 Ninth Ave.	12,000	Feb. 27, 1900	27,300	44
449 West 33d St.	4,500	Nov. 15, 1899	12,000	37
427 West 37th St.	5,000	Apr. 26, 1900	12,000	42
320 West 17th St.	22,000	Dec. 27, 1899	43,000	51
330 West 18th St	16,500	Dec. 27, 1899	38,000	44
352 West 26th St.	9,000	Jan. 11, 1900	18,000	50
347 West 35th St	7,000	Mar. 1, 1900	14,650	48
209 West 26th St.	7,000	May 1, 1900	16,000	44
112 West 25th St.	14,000	Jan. 19, 1900	23,000	61
118 West 29th St.	8,000	Nov. 1, 1899	15,100	53
53 West 16th St.	19,000	Mar. 29, 1899	35,000	54
15 West 22d St.	37,000	June 19, 1900	110,000	34
Fifth Avenue hotel	3,000,000	May 28, 1900	4,225,000	71
Broadway, S. W. cor. 26th St.	1,575,000	Feb. 28, 1899	2,725,000	58
29 West 32d St.	40,000	Jan. 6, 1900	68,500	58
31 West 32d St.	40,000	Nov. 29, 1899	75,500	52
35 West 32d St.	40,000	Nov. 29, 1899	75,000	53
30 West 33d St.	32,000	Nov. 29, 1899	51,000	63
32 West 33d St.	30,000	Nov. 27, 1899	60,000	50

	Assessed value.	Record of transfer.		Per-centage.
34 West 33d St	$30,000	Nov. 29, 1899	$55,000	55
36 West 33d St	30,000	Nov. 29, 1899	60,000	50
8 West 35th St	17,000	Feb. 14, 1900	29,000	59
66 West 36th St	17,500	Nov. 29, 1899	46,500	37
13 West 36th St	33,500	Jan. 16, 1900	55,000	61
The Gridiron, Broadway, 5th Ave. and 23d St	425,000	May 5, 1899	800,721	53
6 East 23d St. and 7 East 22d St	145,000	Feb. 16, 1900	350,000	41
23d St., N. W. cor. Fourth Ave	325,000	June 1, 1899	440,000	74
320 Fourth Ave	11,000	Feb. 1, 1900	30,000	37
104 East 23d St	36,500	Nov. 2, 1899	105,000	35
360 East 10th St	7,000	Jan. 22, 1900	18,000	39
405 East 20th St	4,500	Dec. 27, 1899	10,175	44
1456 to 1460 Broadway	125,000	July 12, 1900	211,000	59
117 and 119 West 46th St	48,000	Nov. 8, 1899	80,000	60
				1,733

Average, 51 per cent.

206 Section 4.

	Assessed value.	Record of transfer.		Per-centage.
126 West 49th St	$25,000	Dec. 23, 1899	$50,000	50
1758 and 1760 Broadway	43,000	May 9, 1899	70,000	61
210 West 50th St	35,000	Dec. 15, 1899	49,800	70
334 West 42d St	23,000	Nov. 3, 1899	38,000	61
351 West 56th St	13,000	Apr. 2, 1900	18,000	72
1825 to 1829 Broadway and 6 to 10 West 60th St	65,000	May 16, 1899	161,000	40
Central park, west, N. W. cor. 62d St	21,000	Sept. 19, 1899	120,000	18
36 West 73d St	24,000	Nov. 21, 1900	45,000	53
20 West 76th St	40,000	Oct. 31, 1899	74,000	54
132 West 72d St	38,000	Nov. 28, 1899	60,000	63
157 West 76th St	18,000	Dec. 7, 1899	34,000	53
Broadway, S. E. cor. 72d St	65,000	Nov. 17, 1899	137,500	47
353 West End Ave	17,500	Mar. 2, 1900	36,000	49
49 West 88th St	20,000	Oct. 29, 1900	32,000	63
158 West 85th St	12,500	Feb. 7, 1900	32,000	39
152 Riverside drive	42,500	Jan. 12, 1900	81,500	52
				845

Average, 52 13-16 per cent.

Section 5.

	Assessed value.	Record of transfer.		Per-centage.
11 West 46th St	$32,000	Dec. 13, 1899	$58,000	55
564 to 568 Fifth Ave	175,000	Mar. 6, 1899	350,000	50
21 West 51st St	43,000	Oct. 27, 1899	85,000	51
23 West 55th St	35,000	Mar. 5, 1900	56,000	63
43 West 55th St	20,000	Nov. 9, 1899	28,800	69
22 East 41st St	12,500	Apr. 30, 1900	35,000	36
667 Fifth Ave	55,000	Mar. 27, 1900	72,500	76
691 Lexington Ave	27,000	Feb. 1, 1900	70,000	38
231 and 233 East 55th St	8,000	Nov. 16, 1899	14,000	57
402 East 58th St	7,000	Apr. 9, 1900	14,000	50
5 East 63d St	46,000	Mar. 30, 1900	105,000	44
15 East 65th St	56,000	Jan. 27, 1900	106,000	53
207 855 Fifth Ave	160,000	July 14, 1900	275,000	58
S. W. cor. Madison Ave. and 68th St	56,000	Sept. 19, 1899	150,000	37
15 East 73d St	26,000	Mar. 12, 1900	54,000	48
953 Madison Ave	26,000	Apr. 18, 1900	42,500	61
165 East 81st St	8,000	Nov. 9, 1899	17,000	47
407 East 72d St	10,000	Oct. 27, 1899	18,750	53
405 East 77th St	11,500	Jan. 27, 1900	22,000	52
23 East 79th St	32,000	Oct. 11, 1899	75,000	43
17 East 80th St	31,000	Oct. 24, 1899	52,000	60
5th Ave., S. E. cor. 84th St	58,000	Apr. 17, 1900	110,000	53
68 East 86th St	27,000	Dec. 7, 1899	47,500	57
953 to 955 Park Ave	40,000	Feb. 28, 1900	73,000	55
212 East 82d St	6,500	Nov. 29, 1899	29,000	22
1621 Second Ave	13,500	Jan. 13, 1900	26,000	52
229 East 85th St	13,000	Dec. 8, 1899	24,000	54
223 East 85th St	6,000	Mar. 31, 1900	10,000	60
1838 Second Ave	16,000	Sept. 30, 1899	30,000	53
418 to 422 E. 81st St	37,500	Feb. 20, 1900	51,500	73
444 to 446 E. 85th St	8,500	Feb. 28, 1900	32,000	27
				1,607

Average, 52 per cent.

Section 6.

	Assessed value.	Record of transfer.		Per-centage.
59 and 61 East 115th St	$29,000	Feb. 24, 1900	$110,000	26
35 to 41 West 117th St	70,000	Apr. 26, 1900	120,000	58
58 East 105th St	16,000	Nov. 29, 1899	30,000	53
1895 Second Ave	18,000	Feb. 6, 1900	26,500	68
2222 First Ave. and 403 and 405 East 114th St	14,500	Feb. 21, 1900	32,000	45
335 Pleasant Ave	5,500	Apr. 26, 1900	11,000	50
24 West 123d St	10,500	Dec. 28, 1899	13,500	77
54 to 62 West 125th St	139,000	Apr. 2, 1900	300,000	46
342 East 119th St	15,000	Jan. 4, 1900	25,250	59
				482

Average, 53 per cent.

208

Section 7.

	Assessed value.	Record of transfer.		Per-centage.
208 West 116th St	$23,000 00	Feb. 17, 1900	$36,500 00	63
8 West 102d St	22,000 00	Mar. 30, 1900	36,000 00	61
58 West 106th St	19,000 00	Aug. 28, 1899	29,750 00	64
850 and 852 West End Ave	70,000 00	Jan. 2, 1900	125,000 00	56
242 to 252 West 103d St	70,000 00	Apr. 25, 1900	194,000 00	36
203 to 207 West 106th St	96,000 00	Jan. 22, 1900	165,000 00	59
747 West End Ave	13,500 00	Mar. 19, 1900	24,000 00	56
Broadway, N. W. cor. 110th St., 90 x 75 ft	23,000 00	May 9, 1899	81,000 00	28
154 West 119th St	11,000 00	Feb. 20, 1900	15,000 00	73
112 West 120th St	14,000 00	Oct. 3, 1899	31,000 00	45
441 Manhattan Ave	18,000 00	Nov. 10, 1899	29,000 00	62
364 West 120th St	9,000 00	Oct. 24, 1899	15,750 00	57
351 West 121st St	8,500 00	Dec. 7, 1899	17,000 00	50
507 Manhattan Ave	13,000 00	May 1, 1900	35,000 00	37
352 West 123d St	9,000 00	Nov. 25, 1899	10,550 00	85
352 St. Nicholas Ave	15,500 00	Mar. 9, 1900	19,500 00	79
82 Lawrence St	4,000 00	Nov. 15, 1899	9,500 00	43
138 West 129th St	18,000 00	Oct. 1, 1900	30,000 00	60
100 and 100½ West 130th St	34,000 00	May 15, 1900	50,000 00	68
195 St. Nicholas Ave	16,000 00	June 14, 1900	22,000 00	73
353 and 355 West 117th St	80,000 00	May 16, 1900	150,000 00	53
306 to 309 West 117th St	68,000 00	Oct. 8, 1900	125,000 00	54
				1262

Average 57 per cent.

Section 8.

	Assessed val.	Record of transfer.		Per-centage.
1951 Amsterdam Ave	$15,000	June 5, 1899	$27,500	54
163d St. S. S. east of Amsterdam Ave., bl'k 2110, lots 20 to 23	15,000	Mar. 27, 1899	35,000	43
156th St., east of 8th Ave., block 2105, lot 57	3,000	May 21, 1900	5,900	51
413 West 156th St., block 2107	12,000	Feb. 28, 1900	23,500	51
158th & 159th Sts., east of 11th Ave., block 2117, lots 61 and 14	5,500	Nov. 20, 1899	16,000	34
519 West 162d St., block 2122	9,500	Nov. 20, 1899	17,500	54
209 Broadway, N. E. cor. 162d St., bl'k 2122, lot No. 47	1,000	Feb. 19, 1900	7,500	13
507 West 166th St., bl'k 2123, lot 71	7,000	Nov. 23, 1899	9,000	78
Audubon Ave., north of 170th St., block 2127, lot- Nos. 30, 31, and 32	3,900	Dec. 14, 1899	8,000	49
550 West 173d St., block 2129, lot No. 16½	8,000	Dec. 1, 1899	15,000	53
559 West 182 St., bl'k 2154, lot No. 60	5,500	Aug. 28, 1899	10,000	55
532 and 533 West 187th St., bl'k 2156, lot- Nos. 72 and 73	10,000	Mar. 30, 1900	26,000	38
659 West 179th St., bl'k 2163, lot No. 43	5,000	Mar. 9, 1900	7,000	71
Sherman Ave., N. E. cor. Academy St., bl'k 2225, lot No. 42	1,700	Dec. 7, 1899	2,525	67
Vermilyea Ave., bl'k 2226, lot No. 4	600	May 9, 1900	1,400	43
				754

Average 50 per cent.

It is stipulated the certiorari proceedings referred to in the stipulations or concessions in the minutes of the prior proceedings include all the proceedings to review the special franchises, assessments and taxes now pending before the referee.

PLAINTIFF'S EXHIBIT "A."

Report of New Amsterdam Gas Company to the State Board of Tax Commissioners for the year ending September 30, 1899, printed in full on page 8 of record.

PLAINTIFF'S EXHIBIT "B."

Supplemental report of New Amsterdam Gas Company to the State Board of Tax Commissioners, printed in full on page 26 of record.

PLAINTIFF'S EXHIBIT "C."

Protest to State Board of Tax Commissioners, printed in full on page 33 of record.

210 The following exhibits are from the Consolidated Gas Company's record, pages 227 to 290.

PLAINTIFF'S EXHIBIT, AUGUST 2, 1901.

Special Laws. Original Charter of New York Gas Light Company.

Laws 1823, chap. 85.

An act to incorporate the Gas Light Company of the City of New York.

Passed March 26, 1823.

Whereas, Samuel Leggett, Moses Cunningham, George Youle, Thomas Morris, and William S. Coe, and others, associated to form a gas light establishment in the city of New York, for the purpose of better lighting the said city, and the buildings, manufactories, and houses therein, have prayed to be incorporated, the better to enable them to carry on the business of their association; therefore,

I. *Be it enacted by the people of the State of New York, represented in senate and assembly.* That the said Samuel Leggett, George Youle, and Moses Cunningham, and their present and future associates, shall be, and hereby are created, constituted, and declared to be a body politic and corporate in fact, by the name of "The New York Gas Light Company;" and by that name they and their successors may have

perpetual succession, and shall, in law, be capable of suing and being sued in all courts and places whatsoever; and may have a common seal, with power to alter the same; and by the name and style aforesaid, the said corporation shall have full power and authority
211 to manufacture, make, and sell gas, to be made of coal, oil, tar, peat, pitch or turpentine, or other materials; and to be used for the purpose of lighting the said city, or the streets thereof, and any buildings, manufactories, or houses therein contained and situate; and to enter into, make and execute any contracts, agreements or covenants, in relation to the objects of this incorporation, and of enforcing the same, and be capable of purchasing, taking and holding any estate or property, real or personal, as shall be necessary to give effect to the purposes of this incorporation, or for the accommodation of their business and concerns: Provided, the value of such real estate shall not exceed one hundred thousand dollars: And provided also, that no public street, lane, or highway in the city of New York, shall be dug into, or in any wise injured or defaced, without the permission of the corporation of the said city first had and obtained.

II. And be it further enacted, That the capital stock of the said corporation, shall not exceed one million of dollars, and that a share in the same shall be fifty dollars, and the subscriptions to the same, or to such part thereof, as from time to time may, by the directors for the time being, be deemed proper and necessary, be opened by the appointment, or under the direction of the directors hereinafter named, or a majority of them, subject to such rules, limitations and conditions, as by them shall be prescribed.

III. And be it further enacted, That the stock, property, and affairs and concerns of the said corporation, shall be ordered, managed, and conducted, under the direction of thirteen directors, being stockholders and citizens of this State; that the said directors shall hold their offices from the third Monday of January, inclusive, in every year, for one year, and shall be elected on the second Monday of January in each year, at such time and place within the city
212 of New York, as a majority of the directors for the time being shall appoint; and that notice of the time and place of holding such election, shall be published in at least two of the public newspapers printed in the city of New York, at least fourteen days previous to the time of holding the said election; and that all elections for directors shall be by ballot, and made by such of the stockholders as shall attend for that purpose, either in person or by proxy; and that each stockholder shall be entitled to one vote, for each share which he, she, or they, shall have held in his, her or their own name or names, at least fourteen days before the time for voting, and that the persons having the greatest number of votes shall be directors, and if it shall happen, that two or more persons have an equal number of votes the directors in office, at the time of such election, shall, by a plurality of votes given by ballot, determine which of the persons so having an equal number of votes, shall be director or directors, so as to complete the whole number;

and the directors so chosen shall, as soon as may be thereafter, proceed in like manner to elect one of their number by ballot, for their president; and if any director shall remove out of this State, or cease to be a stockholder, or shall resign, his office shall be vacant; and whenever any vacancy shall in any manner happen, the same shall be filled by the remaining directors, by plurality of votes, until the next annual election; and that Samuel Leggett, Moses Cunningham, Josiah Ogden Hoffman, George Youle, Richard S. Williams, William Seaman, Thomas Morris, Henry Eckford, Robert Bogardus, George Buckmaster, William S. Coe, Samuel Ackerly, and Thomas H. Smith, shall be the present directors, and shall hold their offices respectively, until the third Monday of January inclusive, which will be in the year of our Lord, one thousand eight hundred and twenty-five, and until others are chosen in their place, and proceed to choose their president at such time and place, as they, or a majority of them shall determine.

213 IV. And be it further enacted, That in case it shall at any time happen, that an election of directors shall not be made on the day appointed by this act for that purpose, the said corporation shall not for that cause, or for any non-user, be deemed to be dissolved, but it shall and may be lawful to hold any election for directors, on any other day, in such manner as shall be provided for by the by-laws and ordinances of the said corporation.

V. And be it further enacted, That the directors for the time being shall form a board; and they, or a majority of them, shall be a quorum for transacting the business of the said corporation, and shall have power to make such by-laws, rules and regulations, not repugnant to the constitution or laws of the United States, or of this State, as to them shall seem needful and proper, touching the government of the said corporation, the management and disposition of the stock, property, estate and effects thereof; the duties of the officers, clerks, and servants employed therein; the election of directors, and all such other matters as may appertain to the concerns of the said corporation; and shall also have power to appoint so many officers, clerks, and servants, for carrying on the business thereof, with such salaries and allowances as to them shall seem meet.

VI. And be it further enacted, That the stock of the said corporation shall be assignable and transferable, according to such rules, and subject to such regulations, as the board of directors shall from time to time make and establish, and shall be considered personal property.

VII. And be it further enacted, That it shall and may be lawful for the directors, or a majority of them, to require payment of the sums to be subscribed, at such time and in such proportions, as they, or a majority of them, shall deem fit, under the penalty of

214 the forfeitures of all previous payments thereon; and that previous notice of the installments required, after the first, and of the time when the same are to be paid, shall be published at least fourteen days, in two of the public newspapers printed in the city of New York.

VIII. And be it further enacted, That if any person or persons shall wilfully do, or cause to be done, any act or acts whatever, whereby the works of the said corporation, or any pipe, conduit, plug, cock, reservoir, or any engine, machine or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending, shall forfeit and pay to the said corporation double the amount of the damages sustained by means of such offense or injury, to be recovered in the name of the said corporation, with cost of suit, by action of debt, to be brought in any court of record in this State.

IX. And be it further enacted, That nothing in this act contained, shall be construed to authorize any banking or insurance privileges, or the issuing of any notes, bills or other negotiable paper, all of which are hereby prohibited to the said corporation.

X. And be it further enacted, That this act shall be deemed a public act, and shall be benignly and favourably construed, for the purposes therein expressed and declared, in all courts and places whatsoever.

XI. And be it further enacted, That the legislature may, at any future time or times hereafter, alter, modify, or repeal this act.

215 Laws 1837, chap. 313.

An act to amend an act entitled "An act to incorporate the Gas Light Company of the City of New York," passed March 26th, 1823.

Passed May 2, 1837.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. It shall be lawful for the New York Gas Light Company of the City of New York to pu-chase, take and hold any estate or property, real or personal, as shall be necessary to give effect to the purposes contemplated by the said act of incorporation, of for the accommodation of their business and concerns, provided, the value of such real estate shall not exceed two hundred and fifty thousand dollars.

SEC. 2. So much of section first of the act hereby amended as is inconsistent with this act, is hereby repealed.

Laws 1855, chap. 424.

An act to amend an act entitled "An act to incorporate the Gas Light Company of the City of New York," passed March twenty-six, eighteen hundred and twenty-three.

Passed April 13, 1855.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. It shall be lawful for the New York Gas Light Company

of the City of New York, to purchase, to take and hold such and so much real estate or property as shall be necessary for their manufacturing and business purposes, and no more provided the value of such real estate or property shall not exceed the sum of five hundred thousand dollars.

216 SEC. 2. So much of the first section of the act hereby amended and of the act amending the same, passed May second eighteen hundred and thirty-seven, as is inconsistent with this act is hereby repealed.

SEC. 3. This act shall take effect immediately.

PLAINTIFF'S EXHIBIT, AUGUST 2, 1901.

Special Laws—Original Charter of the Manhattan Gas Light Company.

Laws 1830, chapter 59.

An act to incorporate the Manhattan Gas Light Company.

Passed February 26, 1830.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. That Robert McDermut, Mordecai Myers, Moses Judah, and their present and future associates, shall be and are hereby created, constituted, and declared, to be a body politic and corporate, by the name of "The Manhattan Gas Light Company," with full power and authority to manufacture, make and sell gas, to be made of coal, oil, tar, peat, pitch, and turpentine, or other materials, and to be used for the purpose of lighting the city of New York, or the streets thereof, and any buildings, manufactories, or houses, therein contained and situate, and to lay pipes for the purpose of conducting the gas in any of the streets or avenues of the said city: And also, that the said company will so conduct their manufactory or manufactories of gas, as not to create a nuisance; and that no public street, lane, or highway, in city of New York, shall be dug into, or in any way injured or defaced, without the permission of the corporation of said city first had and obtained. But the rights

217 and privileges hereby granted, shall not be construed to impair or affect any exclusive rights or privileges heretofore granted to any incorporated company in said city; and the real estate which this corporation is authorized to hold, shall not exceed in value one hundred thousand dollars.

SEC. 2. That the capital stock of this corporation shall not exceed five hundred thousand dollars; and that a share in the same shall be fifty dollars; and books of subscriptions to the said capital stock, or to such portion thereof as from time to time may, by the directors for the time being, be deemed proper and necessary, shall be opened

by the appointment or under the direction of the directors hereinafter named, subject to such rules, limitations, and conditions, as by them shall be prescribed; and the stock of the said corporation shall be deemed and considered personal property.

SEC. 3. The stock, property and affairs of the said corporation, shall be managed and conducted by or under the direction of fifteen directors, being stockholders and citizens of this State; that the said directors shall hold their offices for one year from the third Monday of January in each year, and shall be elected on the second Monday of January in each year, at such time and place within the city of New York, as a majority of the directors for the time being shall appoint; and that notice of such election shall be published in at least two of the public newspapers printed in the city of New York, at least fourteen days previous to the time of holding such election; and every such election shall be by ballot, and by such of the stockholders who shall attend for that purpose, either in person or by proxy; and each stockholder shall be entitled to one vote for each share of the stock which he or she may have held in his or her own name, for at least fourteen days before the time of voting; and the persons having the greatest number of votes, shall be the directors; and if it shall happen that two or more persons
218 have an equal number of votes, the directors in office at the time of such election, shall, by a plurality of votes given by ballot, determine which of the persons so having an equal number of votes, shall be director or directors, so as to complete the whole number to be chosen; and the directors so chosen shall, as soon as may be thereafter, proceed by ballot to elect one of their number for their president; and if any director shall remove out of this State, or cease to be a stockholder, or shall resign, his office shall be vacant; and whenever any vacancy shall happen, the same shall be filled up by the remaining directors, by plurality of votes, until the next annual election.

SEC. 4. That Robert McDermut, Moses Judah, Noah Jarvis, Thomas Bloodgood, Charles A. Davis, William T. McCoun, Mordecai Myers, William L. Morris, Samuel L. Gouverneur, David C. Colden, Charles Henry Hall, Seth Geer, James Wallace, and Charles Graham, shall be the first directors of the said company, who shall hold their offices until the third Monday of January in the year one thousand eight hundred and thirty-two, and until others are chosen in their places; and they shall proceed to choose their president at such time and place as they or a majority of them shall determine.

SEC. 5. In case it shall at any time happen that an election for directors shall not take place on the day appointed by this act for that purpose, the said corporation shall not, for that cause, or for any non-user, be deemed to be dissolved, but it shall and may be lawful to hold an election for directors, on any other day, in such manner as shall be provided for by the by-laws of the said corporation.

SEC. 6. It shall and may be lawful for the directors, or a majority of them, to require payment of the subscription to the capital stock

of the said corporation, at such times and in such proportions as they or a majority of them shall deem fit, under the penalty of forfeiting all previous payment or payments thereon; and that previous notice of the instalments required to be paid, after the
219 first, and of the time when the same are to be paid, shall be published at least fourteen days, in two of the public newspapers printed in the city of New York.

SEC. 7. If any person or persons shall wilfully do, or cause to be done, any act or acts whatever, whereby the works of the said corporation, or any pipe, conduit, plug, cock, reservoir, or any engine, machine, or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, impaired, weakened, injured, or destroyed, the person or persons so offending, shall forfeit and pay to the said corporation, double the amount of the damage sustained by means of such offence or injury, to be recovered in the name of the said corporation, with costs of suit, in an action of debt, to be brought in any court having cognizance thereof.

SEC. 8. In addition to the powers herein before enumerated, the corporation hereby created, shall have and possess all the powers and privileges, and be subject to all the liabilities, contained in title three of chapter eighteen of the first part of the Revised Statutes; and all the provisions thereof, shall apply to this corporation.

SEC. 9. This act shall be deemed a public act, and shall be benignly and favorably construed, for the purposes herein expressed and declared, in all courts and places whatsoever.

SEC. 10. This act shall not take effect, unless the American Gas Light Company shall, within sixty days from the passage thereof, surrender all their chartered privileges under the act, entitled "An act to incorporate the American Gas Light Company," passed March 17, 1827.

220 Laws 1847, chapter 163.

An act to provide for increasing the capital stock of the Manhattan Gas Light Company of the City of New York.

Passed April 29, 1847.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The capital stock of the Manhattan Gas Light Company, of the City of New York, incorporated by an act entitled "An act to incorporate the Manhattan Gas Light Company," passed February 26, 1830, is hereby increased to one million of dollars, to consist of shares of fifty dollars each; and books shall be opened for subscriptions from time to time, in such manner, and under such rules, limitations, and conditions as shall be prescribed by the by-laws of said company.

SEC. 2. Such company shall be authorized to hold such real and

personal estate, as shall be necessary for their manufacturing and business purposes, and no more.

SEC. 3. The whole amount of debts and liabilities of such company, shall not, at any one time, exceed fifty per cent. of the amount of capital actually paid in, and if such amount shall, at any time, exceed said fifty per cent., the stockholders of such company, who were such at the time such excess shall be incurred, shall be individually, jointly and severally liable for such excess, and any one or more such stockholders, who may be so liable, may be made parties in the same suit, for the collection thereof; provided, said stockholders shall not be individually liable, beyond the amount of said excess.

SEC. 4. Said company shall, at all times, keep a book at their office, or usual place of business, in the city of New York, which shall be open to the free inspection of all persons who may desire to inspect the same, at all usual business hours and days, of the city of
221 New York, which shall contain an accurate alphabetical list of all stockholders and amounts of stock, respectively held by them, and showing the time they became such, the amount of capital actually paid in, and the whole amount of debts and liabilities of the company, and such book shall be presumptive evidence, in all places, of what it purports to contain and set forth, in any suit or proceeding against the said company, or the stockholders thereof.

SEC. 5. This act shall take effect immediately.

Laws 1852, chapter 89.

An act to increase the capital stock of the "Manhattan Gas Light Company" of the City of New York.

Passed March 25, 1852.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The capital stock of the Manhattan Gas Light Company, of the City of New York, incorporated by an act entitled "An act to incorporate the Manhattan Gas Light Company," passed February twenty-six, eighteen hundred and thirty, may be increased one million dollars at such times as the board of directors may prescribe.

SEC. 2. This act shall take effect immediately.

Laws 1855, chap. 543.

An act to increase the capital stock of the Manhattan Gas Light Company of the City of New York.

Passed April 17, 1855.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The capital stock of the Manhattan Gas Light Company,

of the City of New York, incorporated by an act entitled, 'An
222 act to incorporate the Manhattan Gas Light Company," passed February twenty-six, eighteen hundred and thirty, may be increased two million dollars at such times and in such manner as the board of directors may prescribe, by resolution of such board. In case such board shall not adopt such resolution within six months from the passage of this act, the said capital stock shall not be so increased.

SEC. 2. Said company shall supply to every inhabitant of the said city of New York who shall request it, and who shall pay for the same, such inflammable gas made by them as he or she may require, provided said gas is required where the mains or pipes of said company are now or may be hereafter laid, at a price not exceeding three dollars per thousand cubic feet, for the period of one year after the adoption of the resolution named in the foregoing section, and after the expiration of that period, at a price not exceeding two dollars and fifty cents per thousand cubic feet.

SEC. 3. This act shall take effect immediately.

PLAINTIFF'S EXHIBIT, AUGUST 2, 1901.

Special Law—Charter of the Metropolitan Gas Light Company.

Laws 1855, chap. 545.

An act to incorporate the Metropolitan Gas Light Company of the City of New York.

Passed April 17, 1855.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. That James Bowen, James Freeborn, William H. Edwards, Rufus F. Andrews, John Callaghan, Charles Spear, Isaac M. Marsh, John H. Platt, Charles W. Baker, Hugh Smith, Wil-
223 liam McDermott and Isaac H. Cady, and their present and future associates shall be and are hereby created, constituted and declared to be a body politic and corporate by the name of "The Metropolitan Gas Light Company of the City of New York" with full power and authority at any time hereafter to manufacture, make and sell gas, to be made of coal, oil, tar, peat, pitch and turpentine or other materials, and to be used for the purpose of lighting the city of New York and the streets, avenues, lanes, alleys, and squares thereof, and any building, manufactories, or houses therein contained and situate, and to lay pipes for the purpose of conducting the gas in any of the streets, avenues, lanes, alleys and squares of the said city, and to adopt any other necessary means to furnish gas to any inhabitant of said city and also that the said company will so conduct their manufactory or manufactories of gas as not to

create a nuisance, and that no public street, avenue, lane, alley, square or highway in the said city shall be dug into or defaced or other means adopted in regard thereto for the purpose aforesaid, without the permission of the two boards of the common council of said city first had and obtained, and the said boards are hereby authorized to grant and vest exclusive permission and authority to and in said company for said purposes to such extent and under such regulations as to them shall seem expedient, and such permission and authority shall be conclusive and shall continue as thus fixed during the period designated by said boards at the time of granting the same. But the rights and privileges hereby granted shall not be construed to affect or impair any exclusive rights or privileges vested in any incorporated company in said city.

SEC. 2. That the capital stock of this corporation shall not exceed two millions five hundred thousand dollars. And that a share in the same shall be one hundred dollars; and books of subscription to the said capital stock or to such portion thereof as from time to time may, by the directors, for the time being, be deemed proper and necessary shall be opened by the appointment or under the direction of the directors hereinafter named subject to such rules, limitations and conditions as by them shall be prescribed; and the stock of the said corporation shall be deemed and considered personal property.

224

SEC. 3. The stock, property and affairs of the said corporation shall be managed and conducted by or under the direction of twelve directors, being stockholders and citizens of this State; that the said directors shall hold their offices for one year; except as provided in section four of this act, and shall be elected at such time and place within the city of New York, as a majority of the directors for the time being shall appoint, and that notice of such election shall be given in at least two of the public newspapers printed in the city of New York, at least fourteen days previous to the time of holding such election, and every such election shall be by ballot, and by such of the stockholders who shall attend for that purpose, either in person or by proxy, and each stockholder shall be entitled to one vote for each share of the stock which he or she may have held in his or her own name for at least fourteen days before the time of voting, and the persons having the greatest number of votes shall be the directors, and if it shall happen that two or more persons shall have an equal number of votes the directors in office at the time of such election shall, by a plurality of votes given by ballot, determine which of the persons so having an equal number of votes shall be director or directors, so as to complete the whole number to be chosen; and the directors so chosen, shall, as soon as may be thereafter, proceed by ballot to elect one of their number president, and and if any director shall remove out of this State or cease to be a stockholder, or shall resign, his office shall be vacant, and whenever any vacancy shall happen the same shall be filled up by the remaining directors, by a plurality for the unexpired term, except as provided in section four of this act.

SEC. 4. That James Bowen, Isaac H. Cady, Rufus F. Andrews, Charles W. Baker, James F. Freeborn, John Callaghan, Isaac
225 M. Marsh, Hugh Smith, William McDermott, William H. Edwards, John H. Platt, and Charles Spear, shall be the first directors of the said company, who shall hold their offices until one year after the said company shall be organized and in practical operation, and until others are chosen in their places, and they shall proceed to choose their president at such time and place as they or a majority of them shall determine. Any of the above named directors on resigning may designate the person or persons to fill the vacancy, provided that the person or persons so designated are stockholders of said company, for the unexpired term. Vacancies by death shall be filled by the remaining directors by a plurality for the unexpired term.

SEC. 5. Each stockholder of any company formed under this act, shall be individually liable to the creditors of such company, to an amount equal to the amount of the stock held by him, for all the debts and liabilities of such company, until the whole amount of the capital stock so held by him shall have been paid into the company, and all the stockholders of any such company shall be jointly and severally liable for all the debts due or owing to any of its laborers and servants for services performed for said corporation, but shall not be liable for an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and then the amount due on such execution shall be the amount recoverable with costs against such stockholders.

SEC. 6. Every corporation formed under this act shall, in addition to the powers hereinbefore conferred, and the powers conferred on corporations in the third title of the eighteenth chapter of the first part of the Revised Statutes, have power:

1. To purchase and hold real estate.

2. To erect and maintain all necessary and convenient buildings, fixtures, and machinery, for the aforesaid purposes, or incident or necessary thereto.

226 3. From time to time to borrow such sums of money as may be necessary for the aforesaid objects, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of said company, at any time not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt.

SEC. 7. It shall and may be lawful for the directors or a majority of them to require payment of the subscription to the capital stock of the said corporation, at such times and in such proportions as they or a majority of them shall deem fit, under the penalty of forfeiting any previous payment or payments thereon; and that previous notice of the instalments required to be paid, after the first,

and of the time when the same are to be paid, shall be published at least fourteen days, in two of the public newspapers printed in the city of New York; provided that no such forfeiture shall be made until the company shall be organized and in practical operation.

SEC. 8. If any person or persons willfully do or cause to be done any act or acts whatever, whereby the works of the said corporation, or any pipe, conduit, plug, cock, reservoir, or any engine, machine or structure, or any matter or thing appertaining to the same, shall be stopped, obstructed, or impaired, weakened, injured or destroyed, the person or persons so offending shall forfeit and pay to the said corporation treble the amount of the damage sustained by means of such offence or injury, to be recovered in the name of the said corporation, with costs of suit, in any court having cognizance thereof.

SEC. 9. The said company shall be deemed to be organized
227 when the president shall be elected, and shall be deemed to be in practical operation from the time the permission and authority provided for in the first section is obtained.

SEC. 10. The said company may receive in lieu of cash subscriptions, property suitable to be used for its purposes, at a valuation to be agreed upon.

SEC. 11. This act shall be deemed a public act, and shall be favorably construed for the purposes herein expressed, and declared in all courts and places whatsoever.

Laws 1881, chapter 476.

An act to provide for the payment of certain certificates of indebtedness of the Metropolitan Gas Light Company of the City of New York.

Passed June 8, 1881, three-fifths being present.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The Metropolitan Gas Light Company of the City of New York, in order to provide for the payment of the outstanding scrip certificates of the company, issued March twenty-fourth and November thirtieth, eighteen hundred and seventy, may, by resolution of the board of directors of the company, issue its bonds to an amount not exceeding the sum of nine hundred thousand dollars, payable within twenty years, the money so provided, by the issue of the bonds of the company, as herein provided, to be applied to the payment of the certificates outstanding, and to no other purpose whatever.

SEC. 2. This act shall take effect immediately.

228 PLAINTIFF'S EXHIBIT NO. 1, SEPTEMBER 4, 1901. J. M. R.

Certificate of Reorganization under General Laws of 1848 *of the New York Gas Light Company.*

(Filed in office of N. Y. county clerk June 1, 1871.)
(Filed in office of secretary of state June 1, 1871.)

Pursuant to the provisions of an act entitled "An act to amend chapter 37 of the Laws of 1848, entitled An act to authorize the formation of gas light companies," passed April 20, 1867, we, the undersigned, owners of two-thirds of the capital stock of the New York Gas Light Company, a gas company incorporated by special act for the purpose of manufacturing and supplying gas in the city of New York, do hereby certify—

That we desire to form a company for the purpose of manufacturing and supplying gas for lighting the streets and public and private buildings of the city of New York;

That the corporate name of the said company is the New York Gas Light Company;

That the objects for which the company is formed are the manufacturing, making and selling gas to be used for the purpose of lighting the city of New York, the streets thereof, and any buildings, manufactories or houses therein contained and situate, and to lay pipes for the purpose of conducting gas in the streets and avenues of said city.

That the amount of the capital stock of the said company is four millions of dollars.

That the term of its existence is fifty years.

That the number of shares of which said stock is to consist is forty thousand.

That the number of directors is nine.

229 That the names of the directors who shall manage the concerns of the company for the first year are Joseph Sampson, William A. Hadden, James R. Taylor, Cornelius L. Everitt, Henry R. Remsen, Moses Taylor, John J. Astor, Frederick W. Stevens and Thomas K. Lees, and that the operations of the company are to be carried on in the city and county of New York.

In witness whereof, we have signed these presents in duplicate this first day of May, one thousand eight hundred and seventy-one.

(U. S. int. rev. 5c. stamp, canceled.)

(Here follow signatures and acknowledgments omitted in printing.)

PLAINTIFF'S EXHIBIT No. 2, SEPTEMBER 4, 1901. J. M. R.

Certificate of Reorganization under General Laws of 1848 *of the Manhattan Gas Light Company.*

(Filed in office of secretary of state December 31, 1867.)
(Filed in office of clerk of N. Y. Co. December 30, 1867.)

(U. S. int. rev. stamp, 5c., canceled.)

Pursuant to the provisions of an act entitled, "An act to amend chapter 37 of the Laws of 1848, entitled, 'An act to authorize the formation of gas light companies,'" passed April 20, 1867, we, the undersigned, holders of two-third- of the capital stock of the Manhattan Gas Light Company, a gas company incorporated by special act for the purpose of manufacturing and supplying gas in the city of New York, do hereby certify:

230 That we desire to form a company for the purpose of manufacturing and supplying gas for lighting the streets and public and private buildings of the city of New York.

That the corporate name of the said company is the Manhattan Gas Light Company.

That the objects for which the company is formed are the manufacturing, making and selling gas to be used for the purpose of lighting the city of New York, the streets thereof and any buildings, manufactories, or houses therein contained and situate, and to lay pipes for the purpose of conducting the gas in the streets and avenues of said city.

That the amount of the capital stock of the said company is four millions of dollars.

That the term of its existence is fifty years.

That the number of shares of which said stock is to consist is eighty thousand.

That the number of directors is nine.

That the names of the directors who shall manage the concerns of the company for the first year are Henry Young, Moses Taylor, John Alstyne, William H. Smith, John R. Ludlow, John J. Cisco, Benjamin W. Bonney, Samuel Sloan, Charles Roome, and that the operations of the company are to be carried on in the city and county of New York.

In witness whereof, we have signed these presents, in duplicate, this sixth day of September, one thousand eight hundred and sixty-seven.

(NOTE.—Here follows subscription and acknowledgments, which are omitted in printing.)

231 PLAINTIFF'S EXHIBIT No. 3, SEPTEMBER 4, 1901. J. M. R.

Municipal Gas Light Company of New York.

Certificate of Incorporation of the Municipal Oxygen Gas Company of the City of New York.

(Filed in the office of secretary of state, and county clerk, June 1, 1894.)

We, George Shea, Sydney Howard Gay, Robert M. C. Graham, Henry I. Robinson, Richard M. Harrison, James M. Varnum and Henry H. Porter do hereby certify that we have formed a company under the provisions of the act entitled "An act to authorize the formation of gas light companies" passed February 16, 1848, and the several acts amendatory thereof, and

First. The corporate name of the said company is the Municipal Oxygen Gas Company of the City of New York.

Second. The objects for which the company is formed are the manufacturing and supplying gas for lighting the streets and public and private buildings in the city of New York.

Third. The amount of the capital stock of the said company is five hundred thousand dollars.

Fourth. The term of the existence of the company is to be fifty years.

Fifth. The said capital is divided into five thousand shares of one hundred dollars each.

Sixth. The number of directors who will manage the concerns of said company for the first year is seven and their names are George Shea, Robert M. C. Graham, Sydney H. Gay, Henry I. Robinson, James M. Varnum, Richard M. Harrison and Henry H. Porter.

232 *Seventh.* The operations of the said company are to be carried on in the city and county of New York.

New York, May 29, 1874.

GEO. SHEA.
SYDNEY-HOWARD GAY.
R. M. C. GRAHAM.
HENRY I. ROBINSON.
R. M. HARRISON.
JAMES M. VARNUM.
H. H. PORTER.

CITY AND COUNTY OF NEW YORK, *ss:*

On this twenty-ninth day of May, one thousand eight hundred and seventy-four, before me personally appeared George Shea, Robert M. G. Graham, Sydney Howard Gay, Henry I. Robinson, Richard

M. Harrison, James M. Varnum and Henry H. Porter, to me known to be the individuals described in and who executed the foregoing certificate and acknowledged that they executed the same.

ROBERT OWEN,
Notary Public, New York.

Change of Name.

By an order of the supreme court, dated June 5, 1876, the name of the Municipal Oxygen Gas Company of the City of New York was changed to the "Municipal Gas Light Company of New York," from and after July 7, 1876.

233 PLAINTIFF'S EXHIBIT NO. 4, SEPTEMBER 4, 1901. J. M. R.

Certificate of Incorporation of the Knickerbocker Gas Light Company.

Filed in office of secretary of state July —, 1876.
Filed in office of N. Y. county clerk, July 10, 1876.

We, the undersigned, being desirous to form a company under and by virtue of the act of the legislature of the State of New York passed February 16th, 1848, entitled "An act to authorize the formation of gas light companies" and the various acts amendatory and supplementary thereof, for the purposes of manufacturing and supplying gas for lighting the streets and public and private buildings of the city and county of New York, State of New York, do hereby certify that the corporate name of said company shall be the Knickerbocker Gas Light Company. That the object for which the company is formed is the manufacturing, supplying, vending and conducting of gas and doing all necessary things for the purpose of manufacturing and vending gas and lighting public and private buildings, streets, avenues and parks in the city of New York with the same.

That the amount of the capital stock is one million five hundred thousand dollars.

That the term of the existence of the company shall be fifty years.

That the capital stock shall consist of fifteen thousand shares of the par value of one hundred dollars each.

That the number of directors who shall manage the concerns of the company for the first year shall be five and their names are

Robert M. C. Graham, of New York city.
Jared E. Redfield, of Essex, Connecticut.
Tilton E. Doolittle, of New Haven, Connecticut.
John Sickels, of New York city.
George Howes, of New York city.

234 The operations of said company are to be carried on in the city and county and State of New York.

In witness whereof, we have hereunto set our hands and seals this twenty-fourth day of June, in the year one thousand eight hundred and seventy-six.

R. M. C. GRAHAM. [L. S.]
TILTON E. DOOLITTLE. [L. S.]
JARED E. REDFIELD. [L. S.]
JOHN SICKELS. [L. S.]
GEO. HOWES. [L. S.]

STATE OF NEW YORK, }
City and County of New York, } ss.:

On this twenty-fourth day of June in the year of our Lord one thousand eight hundred and seventy-six before me personally appeared Robert M. C. Graham, Tilton E. Doolittle, Jared E. Redfield, John Sickels and George Howes, to me known to be the individuals described in and who executed the foregoing certificate and they severally before me signed the said certificate and acknowledged that they signed the same for the purposes therein mentioned.

M. A. POTTER,
Notary Public, N. Y. Co.

PLAINTIFF'S EXHIBIT No. 5, SEPTEMBER 4, 1901. J. M. R.

Certificate of Incorporation of the Harlem Gas Light Company.

(Filed in office secretary of state, Feb. 2, 1855.)
(Filed in office N. Y. county clerk, Feb. 2, 1855.)

We, Burr Wakeman, Henry P. McGown, Walter Brady, Lemuel Arnold and John M. Reed, all of the city and county of New
235 York, whose names are hereto subscribed, being desirous to form a company for the purpose of manufacturing and supplying gas, for lighting the streets and the public and private buildings, and for other purposes, situated and being in all that part of the city and county of New York lying north of the centre line of Seventy-ninth street in said city.

Do for that purpose make, sign and acknowledge this certificate by which we certify that the corporate name of said company shall be and is "The Harlem Gas Light Company."

And that the objects for which said company is intended to be formed are the manufacturing and supplying gas for lighting the streets and the public and private buildings and for other purposes situated and being in all that part of the city and county of New York lying north of the centre line of Seventy-ninth street in said city.

That the amount of the capital stock of said company shall be and is one hundred and twenty thousand dollars, to be divided into two thousand four hundred shares of fifty dollars each.

That the term of the existence of said corporation shall be fifty years.

That the number of the directors of said company shall be five, and that Burr Wakeman, Henry P. McGown, Walter Brady, Lemuel Arnold and John M. Reed hereinbefore named shall be directors of said corporation for the first year, and that the operations of said company are intended to be and shall be carried on in the city and county of New York.

This certificate is made, signed and acknowledged in said city and county of New York before Joseph O. Brown, a commissioner of deeds in and for the city and county of New York, an officer competent to take the acknowledgment of deeds to the intent that
236 he shall duly certify to such making, signing and acknowledgment and with intent that the same shall be filed in the office of the clerk of said city and county, and a duplicate thereof in the office of the secretary of state. The whole to be done with intent thereby to form a corporation under and pursuant to the provisions of the act entitled "An act to authorize the formation of gas light companies," passed February 16th, 1848, and any amendment thereof.

Made, signed and acknowledged in duplicate in the city and county of New York the first day of February in the year one thousand eight hundred and fifty-five.

BURR WAKEMAN. [SEAL.]
HENRY P. McGOWN. [SEAL.]
WALTER BRADY. [SEAL.]
LEMUEL ARNOLD. [SEAL.]
JNO. M. REED. [SEAL.]

In presence of—
——— ———.

STATE OF NEW YORK, } ss:
City and County of New York, }

On the first day of February, A. D. 1855, before me came Burr Wakeman, Henry P. McGown, Walter Brady, Lemuel Arnold and Jno. M. Reed, all known to me to be the individuals described in and who executed the foregoing certificate and acknowledged to me that they executed the same.

JOS. O. BROWN,
Commissioner of Deeds.

237 PLAINTIFF'S EXHIBIT No. 6, SEPTEMBER 4, 1901. J. M. R.

Articles of Consolidation of the Consolidated Gas Co., September 29, 1884.

This agreement, made this twenty-ninth day of September, one thousand eight hundred and eighty-four, between the New York Gas Light Company, the Manhattan Gas Light Company, the Met-

ropolitan Gas Light Company of the City of New York, the New York Mutual Gas Light Company, the Municipal Gas Light Company of New York, the Knickerbocker Gas Light Company and the Harlem Gas Light Company, each of which is a corporation duly organized and now existing under general or special laws of this State for the purpose of carrying on the manufacturing business of making and distributing gas, and herein styled the consolidating companies, or between two or more of said companies the directors or trustees of which shall enter into this agreement and whose stockholders shall on or before November 10th, 1884, sanction and approve of this agreement by the votes of two-thirds of the stockholders present at a meeting to be called for that purpose, pursuant to the provisions of the act entitled "An act to authorize the consolidation of manufacturing corporations" passed May 28th, 1884, witnesseth:

That said companies so sanctioning and approving this agreement have agreed and do hereby agree to consolidate into one corporation under and in accordance with said act of May 28, 1884, and the following are the terms and conditions of such consolidation and the mode of carrying the same into effect.

Article I. The said new corporation to be formed shall be called the Consolidated Gas Company of New York.

Article II. The number of the trustees thereof shall be thirteen.

238 Article III. The names of the trustees who shall manage the concerns of the new company for the first year, and until others shall be elected in their place, are Charles Roome, Thomas K. Lees, Oscar Zollikoffer, John P. Kennedy, Charles G. Francklyn, Thomas Rutter, Harrison E. Gawtry, Percy R. Pyne, Samuel Sloan, James W. Smyth, Henry Day, Arthur Leary and John P. Huggins.

Article IV. The term of the existence of the said corporation shall be fifty years.

Article V. The operations of the said corporation shall be carried on in the city, county and State of New York.

Article VI. The amount of capital of the said new company shall be forty-five millions of dollars, which is the fair aggregate value of the property, franchises and rights of the several companies above named, which are more particularly mentioned in article VII. of this agreement, or if either or any of such corporations shall fail to sanction and approve this agreement, as provided in said chapter 367 of the Laws of 1884, before November 10, 1884, then the capital of such new corporation shall be as much less than forty-five millions as the amount thereof apportioned by section VIII. to either and all of such above named companies so failing to sanction and approve this agreement. The capital shall be divided into four hundred and fifty thousand shares of one hundred dollars each, or if any company or companies fail to sanction and approve this agreement as aforesaid, then into as many shares as the reduced amount of capital will make when divided into shares of one hundred dollars each.

Article VII. Upon the consolidation of such corporation and the

organization of the new company, all and singular the rights, privileges and interests of each of the companies whose stockhold-
239 ers shall have sanctioned and approved of this agreement as hereinabove expressed and as provided in chapter 367 of the Laws of 1884, including all the real estate belonging to such company situate in the city of New York and elsewhere with all appurtenances belonging thereto, all lands and rights to lands under water, all leasehold property, all mains, service pipes and meters, all patents and licenses or rights to use patents, all machinery, plant, tools, horses, wagons, carts and all other property used by said companies in the manufacture of gas, all office furniture and stationery, maps, drawings of property and apparatus owned by each of said companies at the present time, together with their and each of their corporate rights, franchises, licenses to lay mains and pipes, and privileges of every kind whatever, reserving and excepting from the property of each such corporation only cash on hand, debts due to the company and coal and other supplies not included in the schedules furnished for previous valuation, shall be vested in and be the property of the new corporation.

Article VIII. The said capital of forty-five millions of dollars shall be and is hereby apportioned among the said consolidating companies in full consideration of the property, franchises and rights of each of said companies transferred to and vested in the new corporation by this agreement and described in article VII. thereof, as follows:

The New York Gas Light Company	$7,821,000 00
The Manhattan Gas Light Company	12,352,000 00
The Metropolitan Gas Light Company	7,422,000 00
The New York Mutual Gas Light Company	5,922,000 00
The Municipal Gas Light Company	5,276,000 00
The Knickerbocker Gas Light Company	3,104,000 00
The Harlem Gas Light Company	3,103,000 00
	$45,000,000 00

240 Of this sum the new corporation shall retain to its own use and dispose of the sum of one million five hundred thousand dollars, to wit, of fifteen thousand shares thereof, for the purchase of supplies and as a working capital, in such manner as may be hereinafter provided.

The remainder of the capital of said new company shall be and is hereby allotted to and shall be distributed among the stockholders of such consolidated corporation as follows, viz.:

To the stockholders of the New York Gas Light Company	75,600 shares.
To those of the Manhattan Gas Light Company	119,400 shares.
To those of the Metropolitan Gas Light Company	71,750 shares.

To those of the Mutual Gas Light Company.....	57,250 shares.
To those of the Municipal Gas Light Company.....	51,000 shares.
To those of the Knickerbocker Gas Light Company..	30,000 shares.
To those of the Harlem Gas Light Company.....	30,000 shares.

If there shall be any outstanding lien or incumbrance by way of mortgage, or otherwise, upon any of the lands of either of said consolidating companies or any outstanding certificates of credit or other indebtedness or obligation of either corporation at the time of the consolidation, as herein provided, then the said new corporation shall assume the payment of such liens, bonds or indebtedness. Such consolidating company may at the time consolidation takes effect, pay to the said new company the amount of such liens, bonds, obligations or indebtedness in cash, and in default of so doing said new company shall retain in lieu of and as a satisfaction of
241 said liens and indebtedness from the capital stock allotted to stockholders of such company by article VIII. an amount of stock equal to the amount due on such liens and indebtedness for principal and interest to date of consolidation, and the sum to be distributed to stockholders shall be reduced accordingly. Such stock so retained may be sold by the new corporation to provide means to pay such indebtedness.

The said amount of capital stock of the new company to be received by the stockholders of each of the said consolidating companies according to the provision of this article shall be divided among the said stockholders *pro rata* in proportion to the holdings of each stockholder in the stock of said company at the time of the closing of the books of such company previous to consolidation, and such division and distribution shall be made by the new corporation immediately after consolidation is perfected; provided that each stockholder upon and before receiving his or her proportion of stock aforesaid shall assign and deliver to said new corporation, to be cancelled, his or her certificate or certificates of stock in said company so consolidated; it being understood that the delivery of such certificate and cancelling of same shall not be construed as preventing the consolidating companies or either of them from closing up its affairs and distributing its assets not assigned to said new corporation under any of the provisions of this agreement.

Should any such stockholder on such division of stock be entitled to a fraction of a share, a certificate of the ownership of such fractional share shall be issued to him. Said certificate shall provide that when certificates of fractional shares equal to one or more shares shall be presented to said new corporation a full share or shares of stock equal in amount to such fractional shares shall be issued in place thereof, but such fractional shares shall not be entitled to any dividend until they are exchanged for full shares as aforesaid.

242 Each consolidating company shall at the time consolidation takes effect, furnish the new corporation with a list of

its shareholders and the number of shares of stock of its company to which each is entitled.

Article IX. Each consolidating company sanctioning this agreement shall as soon as this agreement has been sanctioned and approved by two or more companies convey to said new corporation, by deed duly executed and acknowledged so as to entitle the same to be recorded, all its property enumerated and described in article seven of this agreement and shall furnish a map or maps with a description of all real estate and a particular schedule of all the other property and rights of property described in article VII.

Article X. Each consolidating company shall furnish to the new corporation, attested by the signatures of the president of such company, a full and complete statement of all liens or incumbrances upon the real estate of said company and a particular list of all outstanding indebtedness and obligations of said company, with a statement of any unsettled claims or pending law suits against the company.

Article XI. Should the board of directors or trustees of either of said companies named as parties to this agreement not enter into the same, or should two-thirds in amount of the stockholders of either of said companies at a meeting thereof to be called as provided in chapter 367 of the Laws of 1884, fail before November 10, 1884, to sanction and approve of this agreement, and should the board of directors of two or more of such companies enter into this agreement under their respective corporate seals, and should two-thirds in amount of the stockholders of two or more of such companies before November 10, 1884, sanction and approve of this agreement, then the said last named companies whose directors have entered into this agreement and whose stockholders have so
243 sanctioned and approved the same, shall and do agree to consolidate on the terms and in the manner in every respect as hereinbefore mentioned, except that the capital stock of said corporation shall be the aggregate amount of stock apportioned by article VIII. of this agreement to the companies whose stockholders shall have sanctioned and approved this agreement as above stated, and such non-assenting company or companies shall not be a party or parties to this agreement, but this agreement as thus made shall be valid and binding upon such companies as shall by their directors or trustees and stockholders legally assent to the same.

Article XII. The trustees of the new corporation shall meet at No. 4 Irving place, on the 10th of November, 1884, at one o'clock p. m. of that day, for the purpose of choosing officers of said new corporation and organizing the business of the same.

A majority of said trustees shall constitute a quorum for the transaction of business. In case of failure of the trustees to meet on the said 10th day of November, a meeting of the same may be called by any three of said trustees at the same place by a notice in writing addressed to each of said trustees and left at his usual place of business or given to him personally.

Said board of trustees shall adopt by-laws which shall be in accordance with the laws of this State for the government of the business and affairs of said corporation and of the board of trustees, and such by-laws shall, among other things, fix the time for the annual meeting of the stockholders for election of trustees and the number and duties of the officers of the corporation and the method of changing or adding to said by-laws.

Article XIII. All obligations and contracts of each of the consolidating companies shall be assumed by the new corporation.

Article XIV. Each of said consolidating companies shall appoint one of their directors, trustees or officers as a member of a
244 committee to be called the adjusting committee. This committee shall choose a chairman and secretary, and shall have power to adjust and settle all questions of difference between all or any parties, and any disputes or claims which may arise out of or in perfecting said consolidation and which are not specifically provided for in this agreement. Should any of said companies herein named fail before November 10, 1884, to sanction and approve this agreement, as provided in said act, the person designated by such company as a member of the adjusting committee shall cease to be a member of such committee.

The decision of a majority of such committee shall be binding on all the consolidating companies and all stockholders therein, as well as upon the new corporation.

Article XV. Either consolidating company may transfer to the new corporation its money on hand, debts due to it, coal and other supplies and material on hand at time of consolidation and not included in the schedules furnished for previous valuations, or any portion of the same, and the same shall be paid for in stock, or partly in stock and partly in cash, as may be desired by such company. Provided, however, that no stock shall be issued for such payment beyond the million and a half of capital reserved and mentioned in article IX. of this agreement. Notice of the desire to make such transfer shall be given to the chairman of the adjusting committee before November 10, 1884.

The value of the property as transferred shall be determined by the adjusting committee. The money to be paid and the stock to be issued in payment therefor shall be distributed proportionately to the stockholders of such consolidating company at the same time and in the same proportion as such stockholders shall receive stock named in article VIII. of this agreement. If any shares of stock remain after paying for such transferred property, they may be disposed of by the new corporation for the purposes aforesaid.

245 This agreement will be executed in different copies, each of which shall be considered an original, the execution of one copy by one of the said companies shall be considered a due execution of the same although the execution by other companies shall be on another copy.

In testimony whereof, each of the said parties hereto have caused these presents to be signed by their respective presidents or vice-

presidents and secretaries and the seal of their respective corporations to be hereunto affixed.

THE NEW YORK GAS LIGHT COMPANY,
By THOMAS K. LEES, *President.*

[L. S.]
Attest: WM. J. CLARK, *Secretary.*

THE MANHATTAN GAS LIGHT COMPANY,
By CHARLES ROOME, *President.*

[L. S.]
Attest: JAS. W. SMITH, *Secretary.*

THE METROPOLITAN GAS LIGHT COMPANY OF THE CITY OF NEW YORK,
By O. ZOLLIKOFFER, *President.*

[L. S.]
Attest: O. F. ZOLLIKOFFER, *Secretary.*

MUNICIPAL GAS LIGHT COMPANY OF NEW YORK,
By CHARLES G. FRANCKLYN, *President.*

[L. S.]
246 Attest: PHILIP ALLEN, *Secretary.*

THE KNICKERBOCKER GAS LIGHT COMPANY,
By HARRISON E. GAWTRY, *President.*

[L. S.]
Attest: SAM'L J. YOUNG, *Secretary.*

THE HARLEM GAS LIGHT COMPANY,
By THOMAS RUTTER.

[L. S.]
Attest: WM. H. OSBORN, *Secretary.*

PLAINTIFF'S EXHIBIT No. 7, SEPTEMBER 4, 1901. J. M. R.

Certificate of Incorporation of the Equitable Gas Light Company of New York.

Filed in office of secretary of state March 10, 1882.
Filed in office of N. Y. county clerk March 11, 1882.

STATE OF NEW YORK, } *ss:*
City and County of New York, }

We, William Rockefeller, John D. Archbold, James R. Keene, Edward Stern, Erazm J. Jerzmanowski, E. N. Dickerson, Jr., Benjamin Brewster do by these presents, pursuant to and in conformity with the act of the legislature of the State of New York, passed on

the sixteenth day of February, 1848, entitled "An act to authorize the formation of gas-light companies" and the several acts of the legislature amendatory thereof, associate ourselves together
247 and form a company under the name and style of "Equitable Gas Light Company of New York," and the following are hereby declared to be—The corporate name of the said company: The objects for which the company is formed: The amount of capital stock of the said company: The number of shares of which the said capital stock of the company shall consist: The term of existence of the company: The number of directors and their names: The names of those who shall manage the concerns of the said company for the first year: The names of the town and county in which the operations of the said company are to be carried on.

I. The corporate name of the said company is hereby declared to be Equitable Gas Light Company of New York.

II. The objects for which the company is formed are as follows: The manufacture of gas and the licensing of other works under patents controlled by the company.

III. The capital stock of the said company shall be two million dollars ($2,000,000) which shall be divided into twenty thousand shares of one hundred dollars ($100) each.

IV. The said company shall commence on the ninth day of March, 1882, and shall continue in existence for the term of fifty (50) years.

V. The number of directors shall be seven. Their names are: William Rockefeller, John D. Archbold, James R. Keene, Edward Stern, Erazm J. Jerzmanowski, E. N. Dickerson, Jr., and Benjamin Brewster.

The names of those who shall manage the concerns of the said company for the first year are:

William Rockefeller, John D. Archbold, James R. Keene, Edward Stern, Erazm J. Jerzmanowski, E. N. Dickerson, Jr., and Benjamin Brewster.

248 VI. The name of the town and county in which the operations of the said company are to be carried on is the city of New York, located within the county of New York.

Witness our hands and seals this ninth day of March, 1882.

WM. ROCKEFELLER.	[SEAL.]
JNO. D. ARCHBOLD.	[SEAL.]
JAMES R. KEENE.	[SEAL.]
E. STERN.	[SEAL.]
ERAZM J. JERZMANOWSKI.	[SEAL.]
E. N. DICKERSON, JR.	[SEAL.]
BENJ. BREWSTER.	[SEAL.]

STATE OF NEW YORK, }
County of New York, } ss.:

On the ninth day of March, 1882, before me personally came the above-named William Rockefeller, John D. Archbold, James R. Keene, Edward Stern, Erazm J. Jerzmanowski, E. N. Dickerson, Jr.,

and Benjamin Brewster, to me known and known to me to be the individuals described in and who executed the foregoing instrument and severally acknowledged that they executed the same.

[SEAL.]

GEO. H. EVANS (11),
Notary Public, New York Co.
M. J. D.

249 PLAINTIFF'S EXHIBIT No. 8, SEPTEMBER 4, 1901. J. M. R.

Certificate of Incorporation of the New York and East River Gas Company.

(Filed in office of secretary of state, December 20, 1893. Filed in office of N. Y. county clerk, December 21, 1893.)

The undersigned, all of whom are of full age and citizens of the United States of America, and two-thirds of whom are citizens of the State of New York, being desirous of becoming a corporation for the purposes hereinbelow specified, pursuant to the provisions of article 6 of chapter 40 of the General Laws of the State of New York, entitled "The transportation corporation law" (chap. 566 of the Laws of 1890, as amended by chap. 617 of the Laws of 1892), do hereby make certificate as follows:

1. The name of the corporation is "The New York & East River Gas Company."

2. Its objects are manufacturing and supplying gas for lighting the streets and public and private buildings of the city of New York, in the State of New York, and manufacturing and using electricity for producing light, heat or power, and in lighting streets, avenues, public parks and places, and public and private buildings of cities, villages and towns within this State.

3. The amount of its capital stock is seven hundred thousand dollars.

4. The term of its existence is to be fifty years from the filing of this certificate, in accordance with law.

5. The number of shares of which its stock shall consist is seven thousand (7,000) of the par value of one hundred dollars each.

6. The number of directors is five.

250 7. The names and places of residence of the directors for the first year are:

Names.	Places of residence.
Michael Coleman	New York city, N. Y.
John B. Summerfield	Brooklyn, N. Y.
Samuel B. Lawrence	New York city, N. Y.
William C. Houston, Jr	Philadelphia, Pa.
William T. Barnard	New York city, N. Y.

8. The names of the towns and counties in which the operations of the corporations are to be carried on, are the city and county of New York, and Long Island City in the county of Queens, and its principal office is to be located in the city and county of New York.

9. The said corporation is to have preferred and common stock, and of its entire capital stock two thousand (2,000) shares shall be six per cent. non-cumulative preferred stock, and five thousand (5,000) shares shall be common stock.

All dividends declared in any one year in excess of six per cent. for the year on outstanding preferred stock shall be declared upon the common stock.

10. Said corporation shall be authorized to purchase, acquire, hold and dispose of shares of stock and bonds and other evidences of indebtedness of any corporation, domestic or foreign, and to issue in exchange therefor, its stock, bonds or other obligations.

In witness whereof, the undersigned do respectively make, sign and acknowledge this certificate in duplicate, this twelfth day of December, one thousand eight hundred and ninety-three.

MICHAEL COLEMAN.
JOHN B. SUMMERFIELD.
SAMUEL B. LAWRENCE.
W. C. HOUSTON, JR.
WM. T. BARNARD.

251 STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this twelfth day of December, one thousand eight hundred and ninety-three, before me personally came John B. Summerfield, Samuel B. Lawrence, William C. Houston, Jr., and William T. Barnard, who are respectively to me personally known and known to me to be four of the persons described in and who executed the foregoing certificate, and they severally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

[L. S.] CARL SCHURZ PETRASCH,
Notary Public, New York County.

PLAINTIFF'S EXHIBIT No. 9, SEPTEMBER 4, 1901. J. M. R.

Certificate of Incorporation of New Amsterdam Gas Company.

STATE OF NEW YORK, *ss:*

The undersigned, all being of full age and citizens and residents of the State of New York, and desiring to form a corporation for the objects and purposes herein specified, pursuant to the provisions of article VI. of the transportation corporation law of said State, do hereby certify as follows, viz.:

First. The name of the corporation is to be "New Amsterdam Gas Company."

Second. The objects for which this corporation is formed are manufacturing and supplying gas for lighting the streets and public and private buildings in the city of New York, in this State, and
252 manufacturing and using electricity for producing light, heat or power, and in lighting streets, avenues, public parks and places, and public and private buildings in said city. The said corporation shall be and is hereby authorized to purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any domestic corporation, and to issue in exchange therefor its own stock, bonds or other obligations.

Third. The amount of the capital stock of the corporation is to be twenty-three million dollars ($23,000,000).

Fourth. The said capital stock shall consist of two hundred and thirty thousand shares of the par value of one hundred dollars ($100) each. One hundred thousand shares thereof shall be preferred stock and one hundred and thirty thousand shares thereof shall be common stock. The holders of preferred stock shall be entitled to receive in each year out of the net earnings of the corporation a fixed yearly dividend of five per centum, payable half-yearly, before any dividends are declared or paid upon the common stock. The dividends upon the preferred stock shall be cumulative; and if in any year dividends amounting to five per centum shall not be paid on the preferred stock, the deficiency shall be payable subsequently out of net earnings before any dividends are declared or paid upon the common stock. In case of liquidation or dissolution of the corporation, the holders of preferred stock will be entitled to be paid in full both the principal of their shares and the accrued dividend charge, before any amount is paid to the holders of common stock.

Fifth. The term of the existence of the corporation is to be fifty years.

Sixth. The number of directors is to be eleven.

253 *Seventh.* The names and places of residence of the directors who are to serve for the first year are as follows, viz.:

Names.	Places of residence.
Edward M. F. Miller	797 Lexington avenue, New York.
James E. Tolfree	27 West 49th street, New York.
Frederick L. Eldridge	102 East 26th street, New York.
William C. Cox	24 West 60th street, New York.
Charles M. Billings	9 Park avenue, New York.
William T. Eldridge	11 West 28th street, New York.
Sherman Flint	60 East 34th street, New York.
Frederick P. Voorhees	330 West 23d street, New York.
Matthew T. Johnston	52 West 21st street, New York.
John B. Summerfield	123 Lafayette avenue, Brooklyn, N. Y.
Noel Gale	Clifton, Richmond county, N. Y.

Eighth. The operations of the corporation are to be carried on and its office is to be located in the city and county of New York.

In witness whereof, the undersigned have made, signed and ac-

knowledged this certificate in duplicate this twenty-eighth day of October, A. D. one thousand eight hundred and ninety-seven.

EDWARD M. F. MILLER.
JAMES E. TOLFREE.
FREDERICK L. ELDRIDGE.
WM. C. COX.
CHAS. MILLER BILLINGS.
SHERMAN FLINT.
WILLIAM T. ELDRIDGE.
FREDERICK P. VOORHEES.
JOHN B. SUMMERFIELD.
MATTHEW T. JOHNSTON.
NOEL GALE.

254 STATE OF NEW YORK, }
City and County of New York, } ss.:

On this twenty-eighth day of October, A. D. 1897, before me personally came Edward M. F. Miller, James E. Tolfree, Frederick L. Eldridge, William C. Cox, Charles M. Billings, William T. Eldridge, Sherman Flint, Frederick P. Voorhees, Matthew T. Johnston and John B. Summerfield, and on this twenty-ninth day of October, 1897, before me personally came Noel Gale, to me severally known to be the persons described in and who executed the foregoing certificate, and severally acknowledged to me that they executed the same.

[SEAL.] GEORGE W. MARTIN,
Notary Public, Kings County.

Certificate filed in New York county.

PLAINTIFF'S EXHIBIT NO. 10, SEPTEMBER 4, 1901. J. M. R.

An agreement, made and entered into at the city of New York the sixteenth day of February, A. D. 1898, by and between the Equitable Gas Light Company of New York and the board of directors thereof, as parties of the first part; the New York and East River Gas Company and the board of directors thereof, as parties of the second part, and the New Amsterdam Gas Company and the board of directors thereof, as parties of the third part.

Whereas, the companies above named, parties hereto, are severally corporations organized under the laws of the State of New York for the purpose of carrying on business of the same nature, viz.: that of manufacturing and supplying gas for lighting the streets and public and private buildings of the city of New York, which business a corporation organized under article VI. of the transportation corporations law might carry on;

255 And whereas, the New Amsterdam Gas Company, party of the third part hereto, is the owner of shares of the capital

stock of said two companies, parties of the first and second parts hereto, and has issued in exchange therefor certain of its own bonds and stock as authorized by law;

And whereas, the parties hereto desire to consolidate said corporations into a single corporation under and in pursuance of the laws of the State of New York in such case made and provided and as in these presents recited:

Now this agreement witnesseth, that the parties hereto, for and in consideration of the premises, have agreed and hereby do agree upon and prescribe the terms and conditions of such consolidation and the mode of carrying the same into effect, which said terms and conditions and mode of carrying the same into effect they mutually covenant and agree to observe, as follows, to wit:

First. The name of the new corporation to be formed by the consolidation of said corporations shall be the same name as that of the corporation party of the third part hereto, viz.: "New Amsterdam Gas Company."

Second. The purposes for which such new corporation is organized are the manufacturing and supplying gas for lighting the streets and public and private buildings in the city of New York, and manufacturing and using electricity for producing light, heat or power, and in lighting streets, avenues, public parks and places, and public and private buildings in said city. The new corporation shall be authorized to purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any domestic corporation, and to issue in exchange therefor its own stock, bonds or other obligations. All and singular the rights, privileges, franchises and interests of every kind belonging to or enjoyed by the corporations so consolidating, and every species of property, real, personal and mixed, of each consolidating corporation,
256 and things in action thereunto belonging, shall be deemed to be transferred to and vested in the new corporation without any other deed or transfer than these presents.

Third. The number of directors who shall manage its affairs shall be eleven.

Fourth. The names and post office addresses of the directors of such new corporation for the first year are as follows: to wit:

Names of directors.	Post office addresses.
James E. Tolfree.....	No. 27 West 49th street, New York.
William C. Lane.....	No. 17 East 38th street, New York.
Edward M. F. Miller.....	No. 797 Lexington avenue, New York.
Noel Gale.....	Clifton, Richmond county, New York.
Frederick L. Eldridge.....	No. 102 East 26th street, New York.
William C. Cox.....	No. 24 West 60th street, New York.
William T. Eldridge.....	No. 11 West 28th street, New York.
Sherman Flint.....	No. 60 East 34th street, New York.
Frederick P. Voorhees.....	No. 330 West 23rd street, New York.
Matthew T. Johnston.....	No. 52 West 21st street, New York.
John B. Summerfield.....	No. 123 Lafayette Ave., Brooklyn, N. Y.

Fifth. The term of the existence of such new corporation is to be fifty years.

Sixth. The operations of such new corporation are to be carried on in the city of New York and the counties or portions of counties embraced within said city.

257 *Seventh.* The principal place of business of such new corporation is to be situated in the city and county of New York.

Eighth. The amount of the capital stock of such new corporation is to be twenty-three million dollars.

Ninth. The number of shares into which such capital stock is to be divided is two hundred and thirty thousand of the par value of one hundred dollars ($100) each.

One hundred thousand shares thereof shall be preferred stock and one hundred and thirty thousand shares thereof shall be common stock. The holders of preferred stock shall be entitled to receive in each year out of the surplus earnings of the new corporation a fixed yearly dividend of five per centum, which dividend shall be payable half-yearly and shall be declared and paid before any dividends are declared or paid upon the common stock. The dividends upon the preferred stock shall be cumulative from and after November 1, 1900; and if in any year after such date dividends amounting to five per centum shall not be paid on the preferred stock, the deficiency shall be payable subsequently out of surplus earnings before any dividends are declared or paid upon the common stock. In case of liquidation or dissolution of the corporation, the holders of preferred stock will be entitled to be paid in full both the principal of their shares and the accrued dividend charge before any amount is paid to the holders of common stock.

Tenth. The manner of distributing the capital stock of such new corporation among the holders thereof shall be as follows:

1. The outstanding shares of the capital stock of said Equitable Gas Light Company of New York not held or owned by the New Amsterdam Gas Company, party of the third part hereto, shall be exchangeable and convertible into the preferred capital stock of such new corporation hereby formed share for share, so that

258 for each share of capital stock of said Equitable Gas Light Company of New York the holder shall be entitled to receive one hundred dollars ($100) par value in preferred capital stock of such new corporation.

2. The outstanding shares of the preferred capital stock of said The New York and East River Gas Company not held or owned by the New Amsterdam Gas Company, party of the third part hereto, shall be exchangeable and convertible into the preferred capital stock of such new corporation hereby formed share for share, so that for each share of preferred capital stock of said The New York and East River Gas Company the holder shall be entitled to receive one hundred dollars ($100) par value in preferred capital stock of such new corporation.

3. The outstanding shares of the common stock of said The New

York and East River Gas Company not held or owned by the New Amsterdam Gas Company, party of the third part hereto, shall be exchangeable and convertible into the preferred capital stock of such new corporation hereby formed share for share, so that for each share of common capital stock of said The New York and East River Gas Company the holder shall be entitled to receive one hundred dollars ($100) par value in preferred capital stock of such new corporation.

4. The outstanding shares of the preferred capital stock of said New Amsterdam Gas Company, party of the third part hereto, shall be exchangeable and convertible into the preferred capital stock of such new corporation hereby formed share for share, so that for each share of preferred capital stock of said New Amsterdam Gas Company the holder shall be entitled to receive one hundred dollars ($100) par value in preferred capital stock of such new corporation.

5. The outstanding shares of the common capital stock of said New Amsterdam Gas Company, party of the third part hereto,
259 shall be exchangeable and convertible into the common capital stock of such new corporation hereby formed share for share, so that for each share of common capital stock of said New Amsterdam Gas Company the holder shall be entitled to receive one hundred dollars ($100) par value in common capital stock of such new corporation.

Upon presentation and surrender of any outstanding certificates of stock in any of said consolidating corporations, respectively parties hereto of the first, second and third parts, certificates of stock in such new corporation above specified shall be issued to the persons entitled thereto, and the surrendered certificates shall be cancelled. The shares of said Equitable Gas Light Company of New York and said The New York and East River Gas Company held and owned by the New Amsterdam Gas Company, party of the third part hereto, and for which its bonds and stock have been issued shall be surrendered to such new consolidated corporation and cancelled, and no additional shares of stock of such new consolidated corporation shall be issued therefor.

In testimony whereof, the said corporations parties of the first, second and third parts hereto have caused these presents to be executed in their respective corporate names by their presidents, or vice-presidents, and their corporate seals to be hereunto affixed, attested by their respective secretaries and directors constituting a majority of the board of directors of each of said corporations have hereunto set their signatures the day and year first above written—in duplicate.

NOTE.—Here follow signatures, acknowledgments and proceedings of stockholders' meetings, which are omitted in printing by consent.

260 PLAINTIFF'S EXHIBIT No. 11, SEPTEMBER 4, 1901. J. M. R.

Articles of Incorporation of the Standard Gas Light Company of the City of New York.

(Filed in office of New York county clerk Feb. 8, 1886. Filed in office of secretary of state Feb. 11, 1886.)

STATE OF NEW YORK, } ss:
City and County of New York, }

We, Benjamin F. Sherman, Charles Carpenter, A. James Laske, Ferdinand McKeige and Charles E. Parker, citizens of the United States, and the State of New York, who desire to form a company for the purpose of manufacturing and supplying gas for lighting the streets and public and private buildings of the city of New York, pursuant to the provisions of an act of the legislature of the State of New York, entitled "An act to authorize the formation of gas companies," passed February 16th, 1848, and of the several acts amendatory thereof or supplemental thereto; do hereby make this certificate in writing pursuant to the provisions of the said acts: and we do state and certify as follows:

First. The corporate name of the company shall be "The Standard Gas Light Company of the City of New York."

Secondly. The object for which the company is formed, is manufacturing and supplying gas for lighting the streets, roads, lanes, alleys, parks and public places and the public and private buildings in the said city of New York.

Thirdly. The amount of the capital stock of the said company shall be five hundred thousand dollars.

Fourthly. The term of the existence of the said company shall be fifty years.

261 *Fifthly.* The number of shares of — the said stock shall consist, is five thousand.

Sixthly. The number of directors who shall manage the concerns of the said company for the first year shall be five and their names are as follows:

Benjamin F. Sherman,
Charles Carpenter,
A. James Laske,
Ferdinand McKeige,
Charles E. Parker.

Seventhly. The name of the town and county in which the operations of the said company are to be carried on, is the city and county of New York.

Dated New York, January 29th, 1886.

B. F. SHERMAN.
FERDINAND McKEIGE.
A. JAMES LASKE.
CHARLES CARPENTER.
CHARLES E. PARKER.

STATE OF NEW YORK, } ss:
City and County of New York, }

On the third day of February, 1886, before me personally appeared Ferdinand McKeige, and James A. Laske, and on the fourth day of February, 1886, before me also appeared Charles Carpenter, and on the sixth day of February, 1886, before me also personally appeared Benjamin F. Sherman and Charles E. Parker, all to me known to be the individuals described in and who executed the foregoing certificate, and severally acknowledged to me that they executed the same.

FRANCIS W. JUDGE, JR.,
Notary Public, New York City.

262 PLAINTIFF'S EXHIBIT, SEPTEMBER 4, 1901.

Special Law as to the Standard Gas Light Company.

Laws 1886, chap. 248.

An act to facilitate the supply of illuminating gas in the city of New York at a reasonable price.

Passed April 29, 1886.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The Standard Gas Light Company of the City of New York is hereby authorized and empowered to lay conductors and mains for conducting gas through and under all the streets, avenues and squares and public places of said city. And as a consideration therefor, the said company shall file in the office of the comptroller of the city of New York a stipulation or agreement that all the gas supplied through such conductors and mains shall have illuminating power of twenty-five candles, and that no greater price or charge for supplying the same shall be asked, charged or received by said company, or its successors, lessees, agents, or assigns, than at a rate of one dollar and fifty cents for each thousand feet of gas; provided, however, that said Standard Gas Light Company shall be subject to the provisions of any general law that may be passed regulating the price of gas in the city of New York; and that said company shall not consolidate, or in any way unite with any other gas company in said city, or in any way pool its earnings or receipts with any other company or organization organized for the distribution and sale of illuminating gas. All gas supplied by said company for any of the public buildings or offices of the corporation of said city situated on the line or lines of the conductors and mains of said company shall be furnished at a rate not to exceed one dollar and twenty-five cents per thousand cubic feet. Whenever

any trenches or excavations shall be made for the laying of
263 any such conductors or mains, the same shall be filled in immediately after the said conductors and mains shall be laid; the earth to be thoroughly rammed as the same is thrown into the trench or excavation, and the pavement to be replaced in a good and workmanlike manner to the entire satisfaction of the commissioner of public works; and in case the said Standard Gas Light Company, or their successors, shall fail or neglect to replace the pavement or pavements to the satisfaction of the commissioner of public works, then the commissioner of public works shall have the right to cause such pavement to be taken up and replaced in a good and workmanlike manner by a person or persons to be appointed by the said commissioner for that purpose, and the expense of such repaving shall be paid by the said Standard Gas Light Company to the commissioner of public works. Also that the said company shall be governed by such rules and regulations as the commissioner of public works, his successor or successors in office, may prescribe for the laying of such conductors and mains and the proper protection and filling of the trenches and excavations, for the taking up, repairing and repaving pavements. And that said company shall supply gas to the public lamps situated on the line or lines of the mains of said company when required by the said city of New York at a maximum rate not to exceed twelve dollars and fifty cents per annum for each lamp burning three thousand eight hundred and thirty-three and one-third hours, and consuming gas through a burner consuming three feet of gas per hour, under a pressure of one inch, the said maximum rate to include the gas, lighting, extinguishing, cleaning, repairing, reglazing, painting lamp-posts and lanterns, replacing the cocks, tubes, burners, crossheads, lamp irons and lanterns.

SEC. 2. If the said company, after having filed said stipulation or agreement, provided for in the first section of this act, and having laid conductors and mains, as therein provided, shall there-
264 after violate the terms of such stipulation or agreement, it shall be the duty of the attorney-general to institute proceedings to forfeit and annul the charter and corporate rights of said company; and if it shall be established on such proceedings that the terms of such stipulation or agreement have been violated by said company, the charter and corporate rights of said company shall thereupon be forfeited and annulled.

SEC. 3. This act shall take effect immediately.

PLAINTIFF'S EXHIBIT, SEPTEMBER 4, 1901.

Special Law as to East River Gas Company.

Laws 1892, chapter 338.

An act to authorize the East River Gas Company of Long Island City to supply gas and electricity in the city of New York.

Approved by the governor April 19, 1892. Passed, three-fifths being present.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The East River Gas Company of Long Island City shall have the right and it is hereby empowered to supply gas and electricity in the city of New York, and for that purpose is hereby authorized, without other or future authority of law or ordinance, to lay and maintain requisite conductors, mains and pipes through and under any streets, avenues or public places of such city. And for the purpose aforesaid such corporation shall have the right, and is hereby empowered, to lay and maintain such conductors, mains and pipes under and across the East river and across any intervening land belonging to the city of New York, or to private persons at such places as it may determine; provided, however, that
265 such conductors, mains or pipes shall be so laid and maintained as not to obstruct or impair navigation, commerce or anchorage of any navigable waters without the consent of the Secretary of War. And such corporation shall have the right and is hereby empowered to acquire, by condemnation or purchase, such real property, public or private, or right, interest or easement therein, for the laying and maintaining of its mains, pipes and conductors as may be necessary in the exercise of the powers hereby conferred. Such property when so acquired shall be deemed to have been acquired and held as and for a public use. Such corporation shall pay annually into the treasury of the city of New York to the credit of the sinking fund thereof, three per centum of its gross receipts from gas furnished by it to private and public buildings in the city of New York through mains laid by it as herein authorized, under the streets or avenues of such city. Such payments shall be made on the first day of November in each and every year for and during the year ending on the next preceding thirtieth day of September.

SECTION 2. The East River Gas Company of Long Island City shall conform to all such general and private and local laws in regard to the laying and maintaining of electrical conductors as are applicable in the city of New York, and in the laying and maintaining of its gas-pipes and mains and conductors shall be subject to

only such regulations not inconsistent with the authority aforesaid as may, from time to time, be prescribed by the department of public works of such city.

SECTION 3. Said corporation shall have the right to supply gas and electricity to any other company or companies engaged in supplying gas or electricity in the city of New York.

SECTION 4. For the purposes of this act the said East River Gas Company shall have the right, and is hereby empowered, to lease any property of any other company or companies engaged in supplying gas or electricity in the city of New York, upon such
266 terms as shall be agreed by the boards of directors and trustees of the respective contracting companies and be assented to in writing by stockholders of each of said companies holding at least two-thirds of the capital stock of their companies respectively.

SECTION 5. Nothing herein shall authorize any increase in the price of gas now authorized to be charged in the city of New York. And the said corporation may continue to charge for gas in Long Island City the price now authorized by law therein.

SECTION 6. All acts or parts of acts, general, private or local, inconsistent with, impairing or limiting the rights or powers conferred by this act, so far as they are inconsistent with, impair, limit or impose other or additional conditions upon the exercise of such rights or powers, are, as to the East River Gas Company of Long Island City, hereby repealed.

SECTION 7. This act shall take effect immediately.

PLAINTIFF'S EXHIBIT NO. 12, SEPTEMBER 4, 1901. J. M. R.

Certificate of Incorporation of the The East River Gas Company of Long Island City.

(Filed in the office of secretary of state May 2, 1890. Filed in office of clerk of Queens county May 3, 1890.)

We, the subscribers, with the design and intention of forming a company for the purpose of carrying on the business hereinafter mentioned, pursuant to and in conformity with an act of the legislature of the State of New York, passed February sixteenth, 1848, entitled "An act to authorize the formation of gas light companies," and the several acts of the said legislature amendatory thereof and supplemental thereto, do hereby certify and declare as follows:

267 *First.* The corporate name of said company shall be the East River Gas Company of Long Island City.

Second. The objects for which said company is formed are as follows, viz: The manufacture, furnishing and sale of gas in the city of Long Island City and town of Newtown, in the county of Queens, State of New York, for lighting the streets and public and private buildings, or for other purposes.

Third. The amount of the capital stock of said company shall be the sum of one million dollars.

Fourth. The time of the existence of the said corporation shall be fifty years.

Fifth. The number of shares of which said capital stock shall consist shall be ten thousand each of the par value of one hundred dollars.

Sixth. The number of trustees who shall manage the concerns of said company shall be five and the names of such trustees for the first year are as follows:

Phillip Burkard, of Long Island City, Isaac L. Egbert, of the city of New York, Clinton Taber, of the city of New York, Franklin Everhart, of the city of New York, and Arthur D. Ballard, of the city of Yonkers.

Seventh. The names of the town and county in which the operations of said company are to be conducted are the city of "Long Island City" town of Newtown, county of Queens.

In witness whereof, we have made and signed this certificate in duplicate, and have hereunto set our hands and seals, the thirtieth day of April, one thousand eight hundred and ninety.

PHILIP BURKARD. [SEAL.]
ISAAC L. EGBERT. [SEAL.]
CLINTON TABER. [SEAL.]
FRANKLIN EVERHART. [SEAL.]
ARTHUR D. BALLARD. [SEAL.]

268 STATE OF NEW YORK, } ss:
City and County of New York, }

I, Thos. Parish Sherman, a notary public, duly commissioned and qualified, do hereby certify that on the first day of May, in the year one thousand eight hundred and ninety, personally appeared before me Philip Burkard, Isaac L. Egbert, Clinton Taber, Franklin Everhart and Arthur D. Ballard, to me severally known and known to me to be the individuals named in and who executed the foregoing certificate, and they thereupon severally acknowledged before me that they did execute the same, for the purposes therein set forth.

In witness of all of which, I have hereunto set my hand and official seal, the day and year first above mentioned.

[SEAL.] THOS. PARISH SHERMAN,
Notary Public, New York County.

Special Laws—Original Charter of New York Mutual Gas Light Company.

Laws 1866, chap. 651.

An act to incorporate the New York Mutual Gas Light Company.

Passed April 17, 1866.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. Henry Shubart, George W. McLean, Robert C. Brown, Henry Friedman, W. W. Highet, Charles Place, John H. Porter, William B. Asten, William T. B. Milliken, William H. Strain, Augustus W. Greenlief, Morton Brock, Robert F. Wilkinson, Marcus L. Cobb, Alexander N. Lewis and Cornelius A. Bunner, and
269 their associates and successors, are hereby created a body politic and corporate with perpetual succession under the name and style of "The New York Mutual Gas Light Company," and by that name may contract and be contracted with, sue and be sued, plead and be impleaded in their corporate name; may have and use a common seal, may alter and change the same at pleasure, and by the name and style aforesaid the said corporation shall have full power and authority to manufacture, make and sell gas, to be made of wood, coals, oil, tar, peat, pitch, turpentine, slate or other materials, and to light any part of the city of New York, except such parts as any person, persons or corporation may now hold and possess the exclusive right to light, and the streets, buildings, manufactories, in such places not so excepted and to enter into and make and execute any contracts, agreements or covenants in relation to the objects of this incorporation, and of enforcing the same; and be capable of purchasing, taking and holding any estate or property, real or personal, as shall be necessary to effect the purposes of this incorporation or for the accommodation of their business concerns, provided that no public street or highway in the city of New York shall be dug into, injured or defaced without the permission of the municipal authority thereof first had and obtained; provided that such permission of the municipal authority shall not be required if the majority of the owners in interest, of the property immediately adjoining the part of the street or highway so dug into, injured or defaced, shall give their consent thereto in writing.

SEC. 2. The capital stock of the said company shall be five hundred thousand dollars, which may be increased by a vote of the directors and with the consent of the owners holding two-thirds of the stock thereof, to one million of dollars, and shall be divided into shares of ten dollars each, and the directors of said company may
purchase property necessary for its business, and issue stock to
270 the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full

stock and not liable to any further calls; but in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact.

SEC. 3. The stock, property and concerns of said company shall be managed by sixteen directors, and Henry Shubart, George W. McLean, Robert C. Brown, Henry Friedman, W. W. Highet, Charles Place, John H. Porter, William B. Aston, William T. B. Milliken, William H. Starin, Augustus W. Greenlief, Morton Brock, Alexander N. Lewis, Robert F. Wilkinson, Marcus L. Cobb and Cornelius A. Bunner shall be the directors for the first year and until others are chosen in their places.

SEC. 4. Whenever the profits which shall be earned by said company, after deducting all expenses and all necessary outlays for labor and materials used in carrying on and extending the business of said company, shall exceed in any one year the sum of ten per cent. upon the whole capital stock of said company, then and in that event the excess over the said sum of ten per cent. shall be divided, the one-half of such excess between the consumers of the gas furnished by said company, *pro rata*, according to the amount consumed by them respectively; and the other half shall be paid as a dividend to such owners and holders of the stock of said company as may be consumers of the gas furnished by said company, provided that no individual holder or owner of said stock shall be entitled to or shall receive nor shall there be paid to him such dividend upon more than fifty shares of said stock.

SEC. 5. The said company shall be subject to all the provisions, duties and obligations contained in, and shall be entitled to all the benefits and privileges conferred by an act entitled "An act to authorize the formation of gas light companies," passed Feb-
271 ruary sixteenth, eighteen hundred and forty-eight, and the acts amendatory thereof and additional thereto, except that all acts and parts of acts inconsistent with sections one, two, three and four of this act are hereby repealed and declared to be inoperative so far as the same are applicable to this act.

SEC. 6. In case the directors of the said corporation hereby created shall consolidate with, or transfer the franchise hereby granted to any of the organized gas companies of the city of New York, the director or directors voting for such consolidation or transfer, shall be deemed guilty of misdemeanor, and upon conviction shall be punished by imprisonment in the penitentiary of said county for a period not less than six nor more than twelve months.

SEC. 7. This act shall take effect immediately.

Laws 1868, chapter 154.

An act in relation to the New York Mutual Gas Light Company, incorporated by an act entitled "An act to incorporate the New York Mutual Gas Light Company," passed April seventeen, eighteen hundred and sixty-six.

Passed April 7, 1868.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The New York Mutual Gas Light Company, incorporated by an act entitled "An act to incorporate the New York Mutual Gas Light Company," passed April seventeen, eighteen hundred and sixty-six, shall be subject to all the provisions, duties and obligations contained in, and shall be entitled to all the benefits and privileges conferred by the twentieth, twenty-first and twenty-second sections of an act entitled "An act to authorize the formation of gas light companies," passed February sixteenth, one thousand eight hundred and forty-eight.

272 SEC. 2. Said company may organize and commence the transaction of its business at any time within three years from the date of its incorporation.

SEC. 3. The provisions of chapter six hundred and fifty-one, of the Laws of One thousand eight hundred and sixty-six, being the act incorporating the said company, are hereby continued in force, except so far as they are inconsistent with this act. Nothing in this act contained shall, nor shall any action of the said company or its stockholders under the first section of this act, be held or construed to affect or repeal the sixth section of the said chapter six hundred and fifty-one, but the said sixth section is hereby continued in force until it is expressly and in terms repealed.

SEC. 4. This act shall take effect immediately.

Laws 1869, chapter 755.

An act to amend an act entitled "An act to incorporate the New York Mutual Gas Light Company," passed April seventeen, eighteen hundred and sixty-six.

Passed May 8, 1869.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The second section of an act entitled "An act to incorporate the New York Mutual Gas Light Company," passed April seventeen, eighteen hundred and sixty-six, is hereby amended so as to provide that the capital stock of the said company shall be divided into shares of one hundred dollars each, instead of ten dollars each, as now provided for by said section.

SEC. 2. This act shall take effect immediately.

273 PLAINTIFF'S EXHIBIT No. 13, SEPTEMBER 4, 1901. J. M. R.

No. 147.

(Form C.—Notice to Corporations that Statement of Valuation of Special Franchise Has Been Filed.)

Office of State Board of Tax Commissioners.

ALBANY, NEW YORK, *April* 28, 1900.

Consolidated Gas Company of N. Y., 4 Irving place, N. Y. city:

You will take notice that the State Board of Tax Commissioners has filed with the dep't of taxes and assessment, N. Y. city, a statement of the valuation of special franchise constructed, maintained or operated by you in the borough of Manhattan N. Y. city, in the county of ——, at the sum of $13,950,000, pursuant to the provisions of the tax law relating to taxation of public franchises as real property, and that under the provisions of such act, it is the duty of the local assessors to place the assessment for such special franchise on the assessment roll in said city in the appropriate column thereof.

Yours very truly, STATE BOARD OF TAX COMMISSIONERS,
(Signed) By PETER DEYO, *Secretary.*

274 *Stipulations.*

It is stipulated that any exhibits not set forth in full in this record may be exhibited in any court before which this proceeding may come at any time and be considered by said court as if printed in full in these papers.

JOHN C. TOMLINSON,
Attorney for Plaintiff.
JOHN C. DAVIES,
Attorney General, for Defendants.

It is stipulated that the foregoing record contains all the testimony taken before the referee bearing upon the issues herein.

JOHN C. TOMLINSON,
Attorney for Plaintiff.
JOHN C. DAVIES,
Attorney General, for Defendants.

275 *Report of Earl, Referee.*

Supreme Court, Albany County.

PEOPLE *ex Rel.* NEW AMSTERDAM GAS COMPANY
against
THE STATE BOARD OF TAX COMMISSIONERS.

To the supreme court:

I, Robert Earl, referee in this case, find the following facts and conclusions of law, to wit:

Findings of Fact.

1. At the times herein mentioned The New Amsterdam Gas Company (herein also called the relator) was and still is a corporation, created and existing under and pursuant to the laws of the State of New York, and has its principal office in the city of New York.

2. Said company is a corporation formed and organized in 1897 by the consolidation of the following-named corporations: Equitable Gas Light Company of New York, the New York and East River Gas Company, and the New Amsterdam Gas Company.

3. That the said Equitable Gas Light Company, the said New York and East River Gas Company and the said New Amsterdam Gas Company were, prior to such consolidation, separate cor-
276 porations theretofore organized and existing under the laws of the State of New York.

4. The right of the relator to lay and maintain its mains in the streets of the city of New York depend upon its ownership through consolidation of the franchise of the Equitable Gas Light Company of New York and the franchise of the East River Gas Company of Long Island City, the former having been granted by an ordinance of the common council of the said city, dated the 26th day of December, 1882, and the latter by an act of the legislature of the State of New York, chapter 338 of the Laws of 1892, and the said right of the relator to lay and maintain its pipes in the streets of the said city of New York are subject to the conditions which are fully set forth in the ordinance and statute referred to, which ordinance and statute are in evidence.

5. Neither the relator nor any of its constituent companies did in fact construct, maintain or operate gas pipes in all the streets of the city of New York.

6. The relator has filed with the State Board of Tax Commissioners all reports required by law or required to be filed by the commissioners. Copies of such reports are in evidence and reference is made thereto for their contents.

7. On or about March 6, 1900, the State Board of Tax Commissioners, claiming to act under and pursuant to the provisions of chapter 712 of the Laws of 1899, proceeded to fix and determine the valuation of the special franchises of the relator at the sum of $5,561,750, and did thereupon make the assessment of such special franchises at the sum aforesaid.

8. Immediately after making such assessment the State board gave notice to the relator in writing, stating that such assess-
277 ment had been made, and that the total valuation of the relator's special franchise was $5,561,750, and that the State board would meet at its office in the city of Albany on March 29, 1900, to hear and determine any complaint concerning such assessment.

9. The relator company by its counsel appeared pursuant to such notice, at the time and place therein stated, before the State board, and requested to be informed by the board concerning and as to what was the amount which said board had determined to be the valuation of the tangible property of the relator company and as to what was the amount fixed and determined by the board to be the valuation of the intangible franchises, rights and permissions of the relator company and as to what was the method, rule or principle, if any, adopted and applied in ascertaining and determining the valuation; but the board refused to give the relator company the whole or any part of the information so requested.

10. Thereupon the relator company complained of the said assessment and filed with the State board a written statement under oath, specifying the grounds of its complaint.

11. Thereafter, and on or about April 28, 1900, the State board, still claiming to act pursuant to chapter 712 of the Laws of 1899, finally determined the valuation of the special franchises of relator to be the sum of $437,433 in the borough of Queens and $3,989,182 in the borough of Manhattan, making a total of $4,426,615, and on or about April 30, 1900, filed in the department of taxes and assessments of the city of New York a written statement of such valuations as finally fixed and determined by the State board, and at or about the same time gave notice to the relator company that such written statement had been filed with the department of taxes and assessments of the city of New York.

278 12. Thereafter the commissioners of taxes and assessments of the city of New York prepared the assessment rolls of the real and personal property of the several parts of the city for the year 1900, and entered thereon before the final review or certification of such rolls by them the valuation of such special franchises of the relator as filed by the State board, and having annexed thereto their certificate that the assessment rolls were correct in accordance with the entries of its several books or records in that department, duly verified the same, and delivered such assessment rolls to the municipal assembly of New York city, as required by law, on the first Monday of July, 1900.

13. Within fifteen days after the final completion and filing of

the assessment rolls in the city of New York, the relator company applied for a writ of *certiorari* to review the assessment, pursuant to which writ this proceeding is pending.

14. The State board did not make a separate valuation or assessment of each franchise, right, privilege or permission owned by the relator, but made one valuation or assessment covering the special franchise of the relator in the streets of the city of New York, and valued the special franchise owned by the relator on January 8, 1900, at the sum of $3,989,182, and in the borough of Queens at the sum of $437,433, making a total of $4,426,615.

15. In making such assessment against the relator the State board fixed upon a certain figure as covering the value of the tangible and intangible property together, and did not separately arrive at a valuation of the tangible and intangible parts respectively.

16. The defendants valued the property of the relator at what they deemed its full and fair value, taking into consideration the
279 original report made by it to the board, subsequent supplemental or special reports, the repor s of the New York city department of assessment and taxes, and after consideration of information from experts retained by the board and of their confidential appraisers and special agents. And they also had before them the "Financial Chronicle" and considered all the elements, factors and considerations which they were enabled to gather from these sources. They based their valuation of the tangible property solely upon the cost of reproduction with an allowance for depreciation.

They considered the market value of its stocks and bonds for what it might be worth, and not as conclusive or as an absolute measure of valuation. They considered the earning power of the property of the company as reported to them by it. They considered the tax rate in New York county, and also the net and gross earnings, and the fact whether the earnings were large or small, and assessed the special franchise at what the members of the board agreed was the full and fair value thereof.

In addition to these facts, which were before the commissioners previous to the hearing of relator, the commissioners had upon and after said hearing before them, and considered the statements, evidence, affidavits and arguments upon such hearing, for the purpose of arriving at their final conclusion as to the valuation of relator's special franchise.

In assessing the special franchise of the relator, and in arriving at the valuation thereof, the defendants did not include in such assessment the valuation of any property except such as is in, above, upon, under or running through the public streets and public places of said city, including the franchises, rights, authority or permission to construct, operate and maintain its pipes and mains in, upon, above, under or through said streets and public places. They did not include in such assessment or valuation the value of the right to be or the franchise to be a corporation.
280 They did not include the value of the good will of the business carried on by such corporation nor did they include the value of

any property other than that above stated and described as having been included by them. Such assessment as made by them of such special franchise of the relator includes the value of the tangible and intangible property in the streets of the city of New York, and was arrived at upon consideration of all the facts and circumstances affecting the value of such property, including the use or right to use such streets and public places which the defendants were able to ascertain.

17. On January 8, 1900, the relator's property consisted of stocks and bond- of other companies, real estate including that embraced in its special franchise, materials and supplies, contracts, patents, good will and franchises of various kinds, including the special franchise.

18. The annual gross earnings of the relator for the year 1899 were $1,847,379.95. Such earnings are derived from the combined use and operation of its entire system and of all its property embraced therein.

19. The actual and true value of the special franchise of the relator, as finally determined by the defendants and as I find was $437,433 in the borough of Queens, and $3,989,182 in the borough of Manhattan, making a total of $4,426,615.

20. The tangible property of the relator included in the special franchise had for many years been entirely assessed by the local assessors in the city of New York.

21. On January 8, 1900, there were in operation in the city of New York other gas companies than the relator, and all of said gas companies had the franchise right, permission and authority to
281 construct, maintain and operate gas-pipes and mains in the streets and avenues of New York city, as the same had been granted to them by the statutes under which they were organized, and the special statutes relating thereto, which are hereby made a part of this finding.

22. All of the aforementioned companies had pipes and mains in the streets of New York on the 1st day of January, 1900, and some of the streets occupied by the pipes and mains of the relator were also occupied by the pipes and mains of some of said companies and said companies competed with the relator, and with each other, but none of said companies occupied all the streets of New York.

23. The State Board of Tax Commissioners had made the following assessments of the special franchises of the above-mentioned companies for the year 1899:

The New York Mutual Gas-light Company.....	$2,326,174
The Standard Gas Company.....	3,127,790
The Consolidated Gas Company.....	13,950,000

24. Other real estate in the city of New York was assessed at only 67 per cent. of its actual and true value, and, therefore, to equalize this assessment with the assessment of such other

real estate there should be deducted from the $437,433 in the borough of Queens the sum of $144,352, and from the $3,989,182 in the borough of Manhattan the sum of $1,316,420.06 and there remains as the value of the special franchise of the relator for the purposes of assessment and taxation under the special franchise tax act in the borough of Queens the sum of $293,081 and in the borough of Manhattan the sum of $2,672,761.94.

25. The following is a correct statement of the assessed value of real estate in the State and in the city of New York, re-
282 spectively, for the years hereinafter stated:

Total assessed real estate in State for 1899	$4,811,593,059
Total assessed real estate in State for 1900	5,093,025,771
Total assessed value of all special franchises in State for 1900	266,202,759
Total assessed value of tangible property for year 1899 included in the special franchises assessed in 1900 for whole State	96,061,902

Total assessed value of real estate in New York city by boroughs for 1899:

Manhattan and Bronx	$2,178,605,905
Kings	609,822,267
Queens	103,752,600
Richmond	40,245,692
Total	$2,932,445,464

Total assessed value of all real estate in the city of New York, exclusive of tangible property included in the special franchise by boroughs for the year 1900:

Manhattan and the Bronx	$2,369,997,504
Kings	651,383,900
Queens	104,427,872
Richmond	42,723,924
Total	$3,168,533,200

Total assessed value of all special franchises in the city of New York by boroughs for the year 1900:

Manhattan	$166,763,669
Bronx	7,272,249
Brooklyn	36,743,057
Queens	6,544,312
Richmond	2,356,064
Total	$219,679,351

283 Total assessed value of the tangible property for the year 1899, included in the special franchises assessed in 1900 for the city of New York by boroughs:

Bronx	$3,768,600
Brooklyn	18,048,775
Manhattan	50,428,750
Queens	2,935,600
Richmond	1,403,500
Total	$76,585,225

Conclusions of Law.

1. Chapter 712 of the Laws of 1899, is a valid and constitutional enactment, practicable and operative, and it gave authority to the defendants to assess the relator's special franchise for the purposes of assessment and taxation.

2. The relator had a hearing and due process of law before the defendants upon the review of their assessment on the 10th day of April, 1900, and was not there deprived of any of its legal or constitutional rights.

3. It was lawful to assess as one franchise the franchise, right, authority, or permission which the relator had in the streets of New York, and which it operated as one system.

4. To equalize its assessment with the assessment of other real property in the city of New York, the relator is entitled to a reduction from the assessment of $437,433 in the borough of Queens, the sum of $142,352, and from the assessment of $3,989,182 in the borough of Manhattan the sum of $1,316,430.06, and as thus
284 reduced the sum of $293,081 must be taken as the value of the relator's special franchise in the borough of Queens and the sum of $2,672,751.94 as the value of the relator's special franchise in the borough of Manhattan for the purposes of assessment and taxation under the act above referred to, and the necessary corrections should be made to that end in the assessment roll and tax books in the city of New York for the boroughs mentioned.

ROBERT EARL, *Referee.*

General Opinion of Earl, Referee.

Special franchise tax cases.

David B. Hill,
Frank H. Platt,
Charles A. Collin,
Samuel A. Beardsley,
Henry J. Hemmens,
Charles F. Brown,
William F. Sheehan,
William N. Dykman,
John C. Tomlinson,
George S. Bixby,
Wm. H. Page, Jr.,

For relators.

John C. Davies,
Henry B. Coman,
J. Newton Fiero,
Louis M. Martin.

For respondents.

State constitution.

EARL, *Referee:*

I think it will be most convenient to consider in separate opinions the points relating to the validity of the special franchise tax law, and I will, therefore, in this opinion confine myself to the contention of the relators that the law violates the home-rule provisions of the constitution. Those provisions, as found in the constitution of 1894, in section 2, of article 10, and copied from the constitution of 1846, are as follows: "All city, town and village officers, whose election or appointment is not provided for by
285 this constitution, shall be elected by the electors of such cities, towns and villages, or some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed as the legislature may direct." The claim is, that the legislature could not take their essential functions from these local officers as they existed at the time of the adoption of the constitution and transfer them to State officers appointed by the governor as provided in the special franchise tax act, chapter 712, Laws of 1899. It is there enacted that the terms "land," "real estate," "real property," as used in the tax laws, shall include, among other things, all structures on, over, under or through streets, "including the value of all franchises, rights or permission to construct, maintain or operate the same, in, under, above on or through streets, highways or public places," and that such a franchise for the purpose of taxation shall be known as a "special franchise;" that a special franchise shall be deemed "to include the value of the tangible property of a person, co-partnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise;" and that "the tangible property so included shall be taxed as part of the

special franchise." It was made the duty of the State Board of Tax Commissioners annually, to fix and determine the valuation of each special franchise subject to assessment in each city, town, village or district, and to file within the time specified with the clerk of such city, town or village a written statement of the valuation of each special franchise in such city, town, village or tax district as fixed and determined by such board, and that the valuation so fixed
286 shall be the assessed valuation on which all taxes, based on such special franchise in such city, town or village for State, municipal, school or highway purposes, shall be levied during the ensuing year; that each city, town, or village clerk shall, within five days after the receipt by him of a statement of the assessment of a special franchise by the State Board of Tax Commissioners, deliver a copy of such statement, certified by him, to the assessors or other officers charged with the duty of making local assessments in each tax district in such city, town or village, and that the valuation of a special franchise as so fixed by the State Board of Tax Commissioners shall be entered by the assessors or other officers in the proper column of the assessment-roll. Provision is made for the review of assessments so made by a writ of *certiorari* directed to the Board of State Tax Commissioners and not to the local assessors and an adjudication in the proceeding instituted by such writ is made binding upon the local assessors and upon the local collectors of the taxes, as if they had been parties to the proceeding. The taxes thus imposed are to be collected and disposed of like other taxes upon the same assessment roll.

The very able and exhaustive arguments made before me upon this constitutional question show that much is to be said upon both sides of the question, and that at least expressions can be found in reported opinions to sustain the contention of each side. In examining the many cases to which my attention has been called, I must bear in mind the admonition contained in the opinion of Chief Justice Marshall in Cohens *v.* Virginia (6 Wheat., 264–399) as follows: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the cases in which those expressions are used." There is also a rule, many times announced by judges, that the legislative will is not to be thwarted as in conflict with the constitution, unless such conflict is clear and undoubted, and that whenever an act of the legisla-
287 ture can be so construed and applied as to avoid conflict with the constitution and give it the force of law such construction should be adopted. The legislature has supreme legislative power except as such power is limited in the Federal or State constitutions, and we must be able to point to some unmistakable constitutional limitation before such power can be curtailed. A further rule must, however, also be observed, that a thing within the intent of the constitution, if that intent can be gathered from the instrument itself, considered in all its parts, or from the history connected with it of which a court can take notice, is for all purposes to be regarded as within its words and terms; and that the plain purpose of the con-

stitution will not be thwarted by a too close adherence to its letter. By the observance of these rules courts will avoid the two extremes of a too-liberal and of a too-strict construction of the constitution.

My attention has been called to no decision in this State or any other State which absolutely dominates this case, and I must look through all the cases which may have some analogy to this and find, if I can, considering the reasons and the public policy upon which the home-rule provisions in the constitution are based, and comparing these provisions with the act of 1899, some reasons or rules which may guide me to a correct conclusion.

The system of home rule for local divisions of the State has come down to us from remote times. It was introduced into this country by the earliest colonists after centuries of struggle in England for its development and establishment there. Upon its vigorous existence depends the successful working of our republican institutions, and it has always been sedulously guarded by our wisest statesmen.

At no time in the history of our State was the idea of home rule by the people more dominant among our statesmen than at the time of the adoption of the constitution of 1846. By that instrument
288 many offices theretofore filled by appointment were to be filled by elections by the people. The system of small senatorial, assembly and judicial districts was inaugurated, and the aim was to bring power home closely to the people as its purest and safest depository.

As has been often said by judges, the constitution was not a new system of government, but it was designed to embody and conserve institutions which the people had developed, to which they were habituated, and which they had found most beneficent in operation and most conducive to their welfare.

In some cases the framers of the constitution named local officers and specified the mode of their election, as in section 17, article 6, and section 1, article 10, in reference to justices of the peace, sheriffs, county clerks and district attorneys. The functions of those officers were not specified, but it was not designed that they should exist without functions. An officer without office, duty, function, power, would, in fact, be no officer. The purpose was not only to provide for the election of those officers, but in conserving home rule, to clothe them with the general functions, which, in the whole history of our State down to the adoption of the constitution, they had exercised. As those officers are named in the constitution, they have been called constitutional officers, and their offices cannot be abolished by the legislature. Their functions may be regulated and increased, and they may also be diminished, but not so as to impair their usefulness and efficiency as local officers; and so it has been decided by the courts of this State. The constitution of 1821 provided that "sheriffs and clerks of counties, including the register and clerk of the city and county of New York, shall be chosen by the electors of the respective counties." By an act of the legislature in 1843, certain judges of the court of common pleas in the
289 city and county of New York were authorized to appoint the clerk of that court; and in Warner *v.* The People (2 Denio,

272) it was held that that act was unconstitutional, on the ground that it took from the county clerk the substance of his office and transferred his most important duties to an officer to be appointed by judges and not chosen by the people; and all that was said in the opinion written in that case has reference to such a state of facts. In The People *v.* Keeler (29 Hun [Supreme Court Reports], 175), the act, chapter 251 of the Laws of 1882, was under consideration. The act provided that the Albany County penitentiary should thereafter be the county jail of the county, and it required the sheriff to remove the prisoners from the building, then occupied as a jail, to the penitentiary. It made the superintendent of the penitentiary, who was appointed by the board of supervisors, the jailer, and gave him the custody and control of all persons confined therein. The act was assailed as unconstitutional, and it was held that, in so far as it deprived the sheriff of the custody and control of the jail and the prisoners therein and gave such custody and control to the superintendent of the penitentiary, it deprived the sheriff of common-law powers and duties pertaining to his office, and violated the constitutional provision requiring sheriffs to be elected by the electors of the county. Here, again, the functions transferred to the new officer were some of the most substantial and important pertaining to the office of sheriff, without which he could not discharge many of the duties which had always theretofore attached to his office. Speaking of this case in 99 New York, 583, Judge Finch said that "the powers and duties of the sheriff were so curtailed or destroyed as practically to subvert his office and bestow it on another."

Justices of the peace at the time of the adoption of the constitution of 1846 and for many years thereafter were a majority of the board of town auditors, and it was their duty, with the supervisor
290 and town clerk, to audit all accounts against the towns of which they were officers. This duty was taken away from them at one time and conferred upon a board of town auditors elected at the town meetings. This act took away from them very important functions and transferred them to other officers, and yet, so far as I know, the act was never challenged on constitutional grounds. So, in 1846, and before and afterward, justices of the peace constituted the board of excise of their town. This function of granting licenses to keep hotels and sell intoxicating liquors was a very important one, and yet by the excise act of 1896, this function was taken from them and transferred and vested elsewhere. That act came under consideration in the case of The People *v.* Murray (149 N. Y., 367), and, while it was assailed on other constitutional grounds, there was no suggestion that it violated the constitution by taking away from justices of the peace some of the functions which they had for a long time exercised. So an act passed in 1857 constituted a board of county excise commissioners in each county and transferred to it the functions previously exercised by the town excise board, composed of justices of the peace; and later excise commissioners were elected at town meetings; and the function of granting liquor licenses was vested in them. Justices of the peace, for many years before 1846, and after-

ward, were in all the towns of this State inspectors of election at town meetings, but now that function has been taken away from them and conferred upon others in many towns in this State. None of these acts, so far as I know, was ever assailed as unconstitutional, in that important functions were taken away from justices of the peace and transferred to other officers. Those acts interfering with important functions of justices of the peace, as they had been exercised for many years prior to 1846, left those officers with their most material
291 functions, and did not materially interfere with the system of home rule intended to be entrenched in the constitution.

In People *v.* Howland (155 N. Y., 270), portions of the act, chapter 22 of the Laws of 1896, were assailed as unconstitutional on the ground that they deprived the justices of the peace of the town of Fort Edward of their constitutional functions. The act provided for the election at town meetings of a police justice, who was to receive a salary, and have all the jurisdiction of a justice of the peace in criminal matters, and also for the election of a police officer as a town officer, who was also to receive a salary and have all the functions of a town constable in criminal matters. The act then provided that no justice of the peace in that town should be compelled to issue process of any kind in any criminal matter, and that if he did do so, he should receive no compensation therefor, and that no sheriff, under sheriff, deputy sheriff or constable should be compelled to execute any criminal process issued by any of the justices of the peace of the town, and if they did do so, they were to have no compensation. The town justices were, therefore, left with all their jurisdiction in criminal matters unimpaired, but not obliged to act, and if they did act, they were denied all compensation, and none of the executive officers named were obliged to execute their criminal mandates. The provisions of the act assailed were held to be unconstitutional by a divided court. The real ground of the decision is a little uncertain, but I think the effect of the decision is that the legislature attempted, by indirection and in evasion of the constitution, to deprive justices of the peace, constitutional officers, of all their criminal jurisdiction which they had always had, and thus *pro tanto* to abolish the office, and that, as it could not wholly abolish the office, it could not abolish such a substantial part of it.

Supervisors are constitutional officers, article 3, section 26,
292 of the present constitution, and so they were under the constitution of 1846. They are town officers, and, as members of the board of supervisors, also county officers. The act, chapter 89 of the Laws of 1901, came under consideration in the case of The People *ex rel.* etc., *v.* The Board of Supervisors of Oneida County, recently decided. The act appointed certain commissioners who were authorized to sell the present court house and county clerk's office in that county and to acquire a site and build a suitable building thereon for the use of the county as a court house and for other public purposes, at an expense not exceeding $350,000. The act commanded the supervisors to provide the money needed to meet all the expenditures of the commissioners under the act. The sole question of any

importance involved in the case was the validity of the act under the home rule provisions of the constitution, and Judge Andrews, presiding at the special term, in a very able opinion, held the act to be constitutional. He said: "Supervisors are constitutional officers. Their rights and duties generally are such as had for many years existed at the time the constitution was adopted, and a law which deprived them of all their power would, doubtless, be invalid. But, on the other hand, the legislature may, to some extent, modify and regulate those powers. The test is whether the act called in question is an attempt to evade the fundamental law, or whether it is merely a permissible modification of the supervisors' duties. (People v. Keeler, 29 Hun. 175; Astor v. The Mayor, 62 N. Y., 567; Matter of application of the mayor, 99 N. Y., 570.) A statute depriving a board of supervisors of the power to build a certain court house seems to me to belong to the latter class. It is a power that in the nature of the case may be seldom exercised by the board, and even when this power is taken away the board remains, substantially, the board of supervisors." The judgment ordered by Judge Andrews was unanimously affirmed in the appellate
293 division upon his opinion, and also by the court of appeals. It is quite true that a board of supervisors under the general laws does not often have occasion to build a court house or other county building, but its power to do so is to be exercised whenever the exigency arises. The fact that it is rarely called upon to exercise the power can have no bearing upon the constitutional question, except to show that the transfer of the power to other officials, leaving it with all its other functions, is not a substantial invasion of its constitutional prerogatives, or a substantial impairment of the system of home rule intended to be guarded in the constitution.

In the City of Syracuse v. Hubbard (64 App. Div., 587), the facts were these: The city, in the year 1899, incurred liabilities in excess of the appropriations and the charter limitations. Under its charter it was not liable for the excess, and its then auditing body, the common council, was prohibited from auditing or paying the same. The act, chapter 402 of the Laws of 1901, was, therefore, passed authorizing and directing the defendants designated in the act to audit all outstanding claims against the city which were incurred in 1899 and which the city was legally or equitably obligated to pay. The act was assailed as in violation of the home-rule provisions of the constitution now under consideration. The claim was that the auditors named in the act were, in a real sense, city officers, as they performed exclusively city functions, which, in that city, had always been discharged by officers elected or appointed in the locality. The learned judge writing the opinion said: "The power of audit conferred upon the defendants and which, if anything, made them city officers, was beyond the auditing power possessed by the common council in 1899, or at the time of the adoption of the constitution. So that if the existence of the office, as a city office, is to

be determined by the functions of the new officer (People v.
294 Pinckney, 32 N. Y., 377–382), it did not exist at the time the constitution took effect and the restriction upon the legislature would not apply." Then, after citing Astor *v.* The Mayor and other authorities, he said, "These authorities give support to the proposition that if the legislature in providing for the accomplishment of a particular specific object which it has power to accomplish designates some person to perform a specified duty that might be performed by a local city or town officer, the fact that such person is charged with that duty does not make him a city or town officer within the meaning of the constitution so long as the general duties or functions of the local officers are not interfered with." There the claims to be audited were such as the local auditors never had authority to audit, although they had the general function of auditing. Here the local assessors never had the authority to assess these franchises, although they had the general functions of assessing property, and the special franchise tax act left those functions untouched. The ground of that decision must be that in such a case there is no material or substantial invasion of home rule, and that thus the constitution has not been violated.

In section 2, article 10, above quoted, the constitution does not not specify any city, town or village officer by name, and the provision was not for the benefit of any officer, but for the benefit of the municipalities. There had always been in this State down to the adoption of the constitution certain municipal officers elected or appointed in the municipalities whose general functions were well understood. It was not the purpose of the framers of the constitution to perpetuate those officers, but their purpose was to perpetuate their general functions for the purposes of home rule in the possession of officers, by whatever name known, elected or appointed in the locality. The offices of assessors, collectors and commissioners and overseers of highways, overseers of the poor and other local
295 officers in cities, towns and villages could be abolished, and their general functions transferred to other officers under different names, but upon the sole condition that such new officers should be locally elected or appointed as provided in the section. So long as such functions remain strictly or substantially local so that the officer discharging them would, in fact and substance, be a local officer, they could not, by any legislative subterfuge, be transferred to any officer appointed by the governor or the legislature, or by any authority outside of the locality.

The assessment of property for the purpose of taxation has always in this State been a function of local officers elected or appointed in the locality where they discharge their duties, and this system of assessment is entrenched in the constitution to secure to the people the home rule to which they had always been accustomed, and of which the people of our race have always been tenacious. The constitution does not concern itself with these officers or even with their functions, except as they conduce to home rule. The end aimed at is home rule, and so long as any act of the legislature does not sub-

stantially impair the right of home rule, there being no other objection, it cannot be successfully assailed. These views, I think, are sustained by the decisions in this State. In The People *v.* Draper (15 N. Y., 532), the section of the constitution now under consideration was very thoroughly discussed by very able judges. In that case the validity of the metropolitan police act was challenged, which combined the four counties of New York, Kings, Richmond and Westchester, and provided for the appointment by the governor of five police commissioners, who, with the mayors of New York and Brooklyn, were to have the appointment and control of the police force of the entire district. The court held that the commissioners thus appointed were not city officers, and that, therefore, the
296 section of the constitution above quoted was not violated. That case held, in effect, that district officers or even State officers could be appointed by the governor to discharge some important functions in cities which had before been discharged by city officers. It has been several times followed and frequently cited as authority by the courts of this State, and, although it has been criticised, it has never been overruled. Its reach should not be extended beyond the precise case then before the court. The legislature, for police purposes, combined into a district contiguous territory inhabited by people largely having common interests and business relations; whose welfare and safety it was supposed would be promoted by a common police force under one head. The municipalities were left with all their other powers, and that act was held not substantially to invade the right of home rule belonging to them.

In People *v.* Pinckney (32 N. Y., 377), it was held that the act of 1865, creating a metropolitan fire district, composed of the cities of Brooklyn and New York, and empowering the governor to appoint the commissioners thereof, who were to have the entire management in the city of New York of the fire department, did not violate the home-rule provisions of the constitution, for the reason that firemen were not officers within the meaning of the constitution, and the Draper case was approved.

In Board of Health *v.* Heister (37 N. Y., 661), an act of the legislature which constituted the metropolitan sanitary district, composed of the territory embraced within the metropolitan police district, composed of the four counties above mentioned, was assailed as unconstitutional, among other grounds, because it clothed the governor with power to appoint the health commissioners for the district in violation of the home-rule provisions in the constitution, and this contention was overruled on the authority of the Draper case.

In The People *v.* Shepard (36 N. Y., 285), an act creating a
297 capital police district, composed of certain portions of Albany and Rensselaer counties and embracing within its bounds various towns and villages, and providing for the appointment by the governor of the police commissioners, was held not to violate the constitution, on the authority of the Draper case.

In People *v.* Acton (48 Barb., 524), affirmed in the court of appeals, the twelfth section of chapter 806 of the Laws of 1867,

which transferred to the board of metropolitan police all the powers and duties conferred by law upon the mayor and common council and all other boards and officers of the city of New York (except the metropolitan board of health) in respect to a large number of important matters, was held to contravene the home-rule provisions of the constitution, above quoted, approving, however, the *Draper* case, and that while the legislature might have the power to take the discharge of such duties from the mayor and common council of New York, it could not do so without imposing them upon officers or boards locally elected or appointed. In the act thus condemned there was a large and substantial invasion of municipal right of home rule and local self-government.

In People *v.* Raymond (37 N. Y., 428), an act was under consideration which authorized the governor to appoint commissioners of taxes and assessments for the city of New York, and it was held that the officers, thus to be appointed were city officers, and that the act was, therefore, unconstitutional. The Draper case was referred to and recognized as authority for the point therein decided.

In the Board of Excise *v.* Barrie (34 N. Y., 657) it was held that the act of 1866, creating a metropolitan board of excise, composed of persons appointed by the governor, violated no provision of the constitution.

In People *v.* Bull (46 N. Y., 57), People *v.* McKinney (52 N. Y.,
298 374), People *v.* Crooks (53 N. Y., 648), Rathbone *v.* Wirth (150 N. Y., 459), People *v.* Mosher (163 N. Y., 32), Devoy *v.* The City of New York (36 N. Y., 449) and the Brenner case, recently decided in the court of appeals, several acts of the legislature were held unconstitutional which, in various ways, sometimes directly and sometimes indirectly, deprived municipalities of the choice of their local officers in violation of the home-rule provisions of the constitution.

The act, chapter 638 of the Laws of 1873, to establish the Rensselaer police district, authorized the governor to appoint the police commissioners of the district constituted by annexing to the city of Troy three small patches of sparsely settled territory, in all less than a square mile; and in The People *v.* Albertson (55 N. Y., 50), the court held, considering all its provisions, that the act was really intended for the city of Troy alone, and that all else was merely colorable; that the police commissioners were really city officers, and that the act, therefore, violated the home-rule provisions of the constitution and was unconstitutional. The Draper case was criticised by the judge writing the opinion, but not overruled, and it was left as authority for the precise point therein decided. As that case decided that the police commissioners were really city officers who should, under the constitution, be elected or appointed in the locality, it does not aid us much in the solution of the problem we now have in hand.

The act, chapter 564 of the Laws of 1865, conferred upon the commissioners of Central park, appointed by the governor, the exclusive care, management and control of portions of Sixth avenue and

certain other streets in the city of New York for the purpose of regulating, grading and otherwise improving the same. In Astor *v.* The Mayor (62 N. Y., 567) that act was assailed on the ground that it violated the home-rule provisions of the constitution by transferring to officers appointed by the governor functions theretofore always discharged by local officers elected or appointed in the locality; and it was held that the act was valid, evidently on the ground that there was no material invasion of home rule, the local officers being left with their general powers over all the other streets and avenues in the city. Miller, J., writing the opinion of the court, said: "The act does not transfer the general powers of local officers elected by the people which existed at the time of the adoption of the constitution in violation of that instrument or confer them upon other officers not elected, but merely confers authority in a particular case to perform acts which have an especial relation to, and connection with, the general purpose and design of the public improvement to carry out which the board of commissioners was organized. It could be carrying the doctrine of non-interference with local officers far beyond any reported case to hold that in no case whatever could any of the powers existing in a local officer at the time of the adoption of the constitution be taken away without violating the provisions cited. If the doctrine contended for is correct, it would be in conflict with a course of legislation in regard to the Central park from its first organization."

The case of Astor *v.* The Mayor was followed in The People *ex rel.* Kilmer *v.* McDonald (69 N. Y., 362), where it was held that an act, chapter 623, Laws of 1870, with subsequent acts amendatory thereof, constituting avenue commissioners named therein, for the purpose of widening an avenue in Saratoga Springs, was not unconstitutional as in conflict with section 2, of article 10 of the constitution. Rapallo, J., writing the opinion of the court, said: "These commissioners do not take the place of the commissioners of highways, but are appointed for the especial purpose of exercising a power, which is undoubtedly possessed by the legislature, of widening a certain designated avenue, by proceedings different from those which could be taken by the commissioners of highways under existing general laws of the State. The commissioners of highways still continue in office and the charge of the avenue thus widened devolves upon them after the fulfillment of the office of the avenue commissioners."

In The People *ex rel.*, etc., *v.* Cheritree (6 T. & C., 473) it was held that the acts, chapter 623 of the Laws of 1870; chapter 293 and 500 of the Laws of 1872, for laying out certain avenues and streets in Saratoga Springs, by commissioners appointed in the act of 1870, were not unconstitutional. In Hanlon *v.* The Supervisors of Westchester (57 Barb., 383), it was held, on the authority of the Draper case, that the legislature had power to appoint commissioners to lay out an avenue in a town, although there were already three commissioners of highways in such town competent to act, and that such commissioners were not town officers.

I have now examined the principal authorities from the courts of this State touching the question now under consideration, and also the statutes therein considered. From the foundation of our State government almost yearly there have been frequent invasions by the legislature and under statutes enacted by it of the rights of municipal home rule fully as serious as that made by the special franchise tax law, which, so far as I can find, have gone unchallenged in the courts. The legislature has either appointed or authorized the governor to appoint park commissioners, court-house commissioners, water commissioners, bridge commissioners and highway commissioners, in many cases thus interfering, to some extent, with the functions of local officers. It has from time to time diminished the powers and duties of constitutional local officers, such as sheriffs, justices of the peace and supervisors, thus depriving them of some of the functions they had prior to 1846.

The cases from other States to which my attention has been
301 called shed no new or further light upon this question. Some of them arose under different constitutional provisions, nearly all of them bear upon phases of the questions of home rule and local self-government embodied in fundamental law, about which there is no longer dispute in the courts of this State. They deal with statutes which took from local officers a large share of their functions and transferred them to officers appointed by the legislature or governor, or authorized the appointment of purely local officers in the same way. They are a class of cases of which the Raymond case, the Bull case and other like cases, the Keeler case, the Albertson case and the Howland case, above referred to, are typical.

In consideration of all the authorities to which my attention has been called it is difficult, and probably impossible, to formulate a general rule by which we can always accurately determine when the home-rule provisions of the constitution have been invaded. While many cases may be put into a class dominated by decisions already made, there will always be border cases which must depend upon the facts they present, and in the solution of which analogies, general principles and public policy must be resorted to. In the case of constitutional officers, so called, their functions cannot be entirely taken away. In the case of the local offices in cities, towns and villages, provided for in that portion of section 10 now under consideration, they can be abolished, but their substantial functions must remain in officers locally elected or appointed so as to preserve substantially home rule as it existed prior to 1846 and afterward. Those functions are not defined. They may be modified or regulated, but must be left, so far as needful to secure substantial home rule, to people living in the municipal divisions named. They cannot be taken away directly or indirectly or by any legislative subterfuge, but so long as they remain so that it can be said with truth that home rule is left to the localities, no complaint on constitutional grounds
302 can be made of legislative invasion. The question in every case arising under these home-rule provisions is, Has the legislature taken away from officers elected or appointed in

the locality any function essential to home rule? If it has, its acts must be condemned; if it has not, the act must stand. As some of the cases above referred to show, the legislature may take away from local officers some of the functions they have always exercised without materially impairing municipal home rule. The legislature has taken from sheriffs the right and duty, which they always before possessed, to hold and execute convicted murderers and conferred that right and duty upon State officers. They still remain sheriffs with their substantial functions unimpaired. It can take away from justices of the peace jurisdiction and functions which they always exercised and they still remain justices for the substantial purposes of home rule. It can take from highway commissioners functions which they had always exercised over certain streets and bridges and confer such functions upon officers appointed outside of the locality under its authority. It can, to some extent at least, take away from cities the management and control of their parks without depriving them of the substantial rights of home rule. It can take away from supervisors some of the functions which they had always exercised, and from boards of supervisors the right to build the public buildings needed for the use of their county, and they are still left with the great body of home-rule functions. The transfer tax law is, undoubtedly, constitutional, although the localities have nothing whatever to do with the appraisal of the property to be taxed, or the levy or the disposition of the taxes. It does not matter that this tax is really a tax upon the right of succession; it is, nevertheless, a tax, and its amount is determined by valuing property. Before the death of the owner it was assessed by local assessors to him. After his death and
303 the ownership has passed to others, it is appraised to furnish the basis of taxation by officers not elected or appointed in a locality like local assessors. This is no material invasion of home rule. The assessors remain with substantially all the functions they ever exercised. There is a body of home rule functions intended to be protected by the constitution, and so long as those functions are left to local officers, so that in every real sense home rule and local self government, as it existed prior to 1846, is preserved, no complaint can be made of legislative urus-pation.

So that in any particular case it may be a matter of the degree and the extent of the invasion. It is no answer to these views to say that if the legislature can take away some of the functions of a local officer, it may take them all away, and thus create complete centralization of power at Albany. My reasoning and all the authorities show that this cannot be done. There can be a vast centralization of power at Albany within the pale of the constitution which may be very unwise and yet not unconstitutional, and the only remedy for this is in the hands of the people, who are the real sovereigns, and who can, however temporarily swayed, be trusted to conserve the fundamental principles upon which our republican institutions rest and to promote the general welfare.

Now, does the special franchise act substantially invade the home rule rights of cities, towns and villages? Are they in any material manner deprived of local self-government? The franchises taxed under this act were never before taxed (Smith *v.* The Mayor, 68 N. Y., 552; People *ex rel.*, etc., *v.* Commissioners of Taxes, 104 N. Y., 240; People *ex rel.*, etc. *v.* Coleman, 126 N. Y., 443; People *ex rel.*, etc., *v.* Barker, 146 N. Y., 304, and The People *ex rel.*, etc., *v.* Barker, 152 N. Y., 47). It is true that they were property, but they were not so specified in the statutes relating to assessments and taxation that they could be assessed or taxed. They are intangible prop-
304 erty, generally without the market or salable value other real estate has for the guidance of local assessors. They most always extend through several taxing districts and frequently through several municipalities. It is, at least, very difficult to assess their value. With the best of advantages and with the aid of expert skill and great experience and study it is difficult, if not impossible, to reach a satisfactory basis for their valuation. We know from our observation and experience how incompetent local assessors are to deal with such property generally not wholly within any assessment district. Under such circumstances, with this new species of property, generally having no precise circumscribed *situs* like other real property, the legislature in this act made this property taxable, and committed its assessment to the State Board of Tax Commissioners, who can study the problems involved in the assessment and call to their assistance expert aid and resort to all needed sources of information as to values. Having all the franchises in the State to assess, they can obtain knowledge and skill in valuing such property which local assessors could never be expected to obtain. How can it be said that, as to this new species of taxable property thus circumstanced, the localities have been deprived of local self-government by the law in question?

But it is said on behalf of the relators that the tangible property used in the streets in connection with these franchises was before assessable by the local assessors and that, therefore, the function of assessing such property could not be transferred to State officers. It is true that this tangible property was before taxable, but it is intimately connected with the franchises. Indeed, it has very little value without the franchises and would have no existence but for the franchises, and the franchises would be of no value without tangible property to operate them, and so they are in-
305 separable (People *v.* O'Brien, 111 N. Y., 1). I do not believe that, taking the assessment of these two kinds of property from the local assessors was a substantial violation of the right of local self-government.

It is true that the property thus assessed is of great value in the cities of New York and Brooklyn and throughout the State, but it constitutes but a small fraction of the property of the whole State. Notwithstanding the subtraction made by this act from the functions of the local assessors, they still remain assessors with the great body

of their functions untouched and the self-government of the localities is not seriously or materially impaired. The assessments as made by these State officers are to be placed by the local assessors upon their assessment-rolls and then the taxes to be levied in the localities are to be apportioned to the same by local officers, and they are to be collected and disposed of like other taxes by local officers.

I do not wish to be misunderstood. I do not hold that every little violation of the constitution can be condoned. No real violation can be. Where a statute is challenged as violating the constitution the question must always be, Is there a violation? And when there are definite constitutional provisions no departure whatever from them can be allowed. I mean such provisions as are found in sections 1, 2 and 6 of article 1, and in many other sections of the constitution.

I do not think that the fact that the writ of *certiorari* to review these assessments is required to be directed to the State tax commissioners alone and that no local officials are made parties to the proceedings has any bearing upon this constitutional question. All right of review, except before the commissioners themselves, could have been withheld. They are the proper parties to represent the State and all parties interested in upholding the assessments.

My conclusion is, therefore, that there is not, by the special franchise tax act, such a clear violation of the home-rule provis-
306 ions of the State constitution as authorizes any court to pronounce it invalid on that ground.

Special Franchise Tax Cases.

Federal Constitution.

EARL, *Referee:*

I will, in this opinion, examine the contention of the relators that the special franchise tax act, chapter 712 of the Laws of 1899, violates the provision of the Federal Constitution forbidding the State to pass any "law impairing the obligation of contracts." The arguments and illustrations bearing upon this contention have been so numerous (as well as able and ingenious) that it must not be inferred because some of them have not been noticed in this opinion that they have been overlooked, as I have given all of them careful consideration.

These franchises were all granted by municipalities under statutory authority, or by the State, and the terms and conditions of each grant were specified in the law or ordinance granting the same. The grantees were required to pay, as a consideration or in full satisfaction, a gross sum, or annual sums, or a percentage on receipts, or license fees, and generally to conform to other conditions and stipulations contained in the grants more or less burdensome in the use of the franchises granted. These were all considerations for the grants (Mayor, etc., *v.* Second Avenue Railroad Company, 32 N. Y.,

261), and most of them were periodical or continuous during the existence of the franchise rights granted. While the grantees were under continual obligations of some sort, the grantors were under no obligation to do anything subsequently to the grants, except what every grantor is bound to do, to wit, not to nullify or impair the grant. So far as concerns the grantors, the grants were executed grants, while on the part of the grantees, the obligations were generally executory, and thus these grants were contracts in a
307 broader sense than grants completely executed on both sides when made (State of New York *v.* The Mayor, etc., 3 Duer, 119; Brooklyn Central Railroad Company *v.* Brooklyn City Railroad Company, 32 N. Y., 264; Mayor, etc., *v.* Second Avenue Railroad Company, *supra*). There were no stipulations or provisions in any of these grants about taxes or in any way exempting the grantees from taxation for and on account of the franchises granted.

The franchises were, in every sense, property in their nature usable, vendable, transferable, inheritable under the laws of the State, and thus constituted real wealth in the ownership of the grantees (People *v.* O'Brien, 111 N. Y., 1; The People *ex rel.*, etc., *v.* Deehan, 153 N. Y., 528; Ingersoll *v.* Nassau Electric Railroad Company, 157 N. Y., 453). But they were not, prior to 1899, taxable, for the reason that they were not described or designated as property for the purposes of assessments and taxation in the tax laws of the State. (Smith *v.* The Mayor, 68 N. Y., 552; People *ex rel.* Panama Railroad Company *v.* Commissioners of Taxes, 104 N. Y., 240; The People *ex rel.* Union Trust Company *v.* Coleman, 126 N. Y., 443; People *ex rel.* Manhattan Railroad Company *v.* Barker, 146 N. Y., 304; Same *v.* Same, 152 N. Y., 417.)

The act of 1899 is not a special law subjecting these franchises to taxation, but it is a general law amending the general tax law. It amends subdivision 3 of section 2 of that law so as to read as follows, the words in italics being new:

"The terms 'land,' 'real estate' and 'real property,' as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect
308 wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, underground or elevated railroads, *including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways or public places;* all railroad structures, substructures and superstructures, tracks and iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property,

substance or product capable of transportation or conveyance therein or that is protected thereby, *including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon or through, any streets, highways or public places, any mains, pipes, tanks, conduits or wires, with their appurtenances, for conducting water, steam heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes;* all trees and underwood growing upon land, and all mines, minerals, quarries, and fossils in and under the same, except mines belonging to the State. *A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public*
309 *place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.*"

Then further amendments provide for the annual assessment of the special franchises by the State Board of Tax Commissioners, for a review before them, for a writ of *certiorari* to review in the courts their final determination and for placing upon the assessment-roll, prepared by the local assessors, the assessments so made by the State board. It also provides as follows:

"Deduction from special franchise tax for local purposes.—If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town or village in which the tangible property is located, it shall appear that the person, copartnership, association or corporation affected has paid to such city, town or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, association, or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town or village, except money paid or expended for paving or repairing of pavement of any street, highway, or public place, shall be deducted from any tax based on the assessment made by the State Board of Tax Commissioners for city, town or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for city, town or village purposes. The chamberlain or treasurer of a city, the treas-
310 urer of a village, the supervisor of a town, or other officer to whom any sum is paid for which a person, copartnership, association, or corporation is entitled to credit as provided in this section, shall, not less than five nor more than twenty days before a tax on a special franchise is payable, make and deliver to the collector or receiver of taxes or other officer authorized to receive taxes for such city, town or village, his certificate show-

ing the several amounts which have been paid during the year ending on the day of the date of the certificate. On the receipt of such certificate the collector, receiver or other officer shall immediately credit on the tax-roll to the person, copartnership, association or corporation affected the amount stated in such certificate, on any tax levied against such person, copartnership, association or corporation on an assessment of a special franchise for city, town or village purposes only, but no credit shall be given on account of such payment or certificate in any other year, nor for a greater sum than the amount of the special franchise tax for city, town or village purposes, for the current year; and he shall collect and receive the balance, if any, of such tax as required by law."

The act does not levy any tax upon these franchises, but taxes are to be levied upon them under the general laws of the State in the same manner as upon other property placed upon the assessment-rolls.

The taxing power of the State is practically unlimited. Everything that is really property of value to the owner may be taxed in common with all property, unless plainly exempted from taxation by some sort of valid contract. But a burden imposed upon property for public purposes under the guise of taxation, the purposes or necessary effect of which is arbitrarily to confiscate property or to impair contracts, cannot be upheld.

311 It is conceded that if the city or the State had exacted from these corporations for the use of their franchises additional conditions, or further payments than originally stipulated, such exactions would have been illegal as impairing the obligation of contracts. While the franchises belong to the State, they were public property held like other public property for the benefit of the whole people of the State, or for the benefit of the people living in the locality where they had their *situs*. But when they were granted, they became private property like other private property, and became a part of the mass of property within the State in private ownership segregated from the public ownership and there is no reason of public policy founded upon their nature to condemn their taxation.

All the lands in this State are held in some way under grants from the State. In most cases the grantees pay what at the time was considered an adequate and full consideration for the lands granted. It would be a novel proposition to contend now that the lands thus granted—grants being in law contracts—could not be taxed like the mass of other property. Suppose the State leased land for a long term of years, or in perpetuity, for rent to be paid, or other considerations to be performed annually, will any one seriously contend that such lands could not be taxed without the impairment of the obligation of contracts? And yet there would be there, as here, a continuous contract on the one part not to annul or interfere with the lease, and on the other part to pay the stipulated rent. Lands thus granted or leased no more enter into the general mass of property and private ownership than these franchises granted to individuals or corporations.

It is not true that a State cannot tax its own executory contracts or municipal executory contracts. Unless there is a stipulation in bonds issued by the State or a municipality exempting them from taxation, they are taxable in the hands of the owners like the
312 notes or bonds of individuals or corporations. (The People *ex rel.* Manhattan Fire Ins. Co. *vs.* The Commissioners, 76 N. Y., 64.) And such taxation does not impair the obligation of such contracts. While such bonds stipulate for the payment of definite interest, they are property and taxable as such, like other property. No part of the interest can be withheld under the guise of taxation. The contract must be performed as made and after the interest has been paid to the person entitled, then the money so paid becomes taxable like other personal property belonging to such person. The tax upon these franchises is not an additional compensation for them, exacted by the State, but it is a burden imposed upon them, as upon all other property, for the support of the Government which protects them and makes their use valuable.

So I cannot conceive how it can be successfully contended that these franchises cannot be taxed by the municipalities and the State like other property without impairing the obligation of contracts, and no authority has been brought to my attention upholding such contention. The Mayor *v.* Second Avenue Railroad Co. (32 N. Y., 261), and The Mayor *vs.* Third Avenue Railroad Co. (33 N. Y., 42) were cases wherein the city undertook to exact from the railway companies license fees beyond those stipulated in the original contracts and are no authority whatever for the contention that the State or the city cannot impose taxes upon such corporations for their franchises. The City of Walla Walla *v.* Walla Walla Water Company (172 U. S., 1), The Little Falls Electric and Water Company *v.* The City of Little Falls (102 Fed. Rep., 663), New Orleans Gas-Light Company *v.* Louisiana Light, etc., Company (115 U. S., 650), New Orleans Water-Works Company *v.* Rivers (115 U. S., 674), Louisville Gas Company *v.* Citizens' Gas-Light Company (115 U. S., 683), St. Tammany Water-Works Company *v.* New Orleans Water-Works Company (120 U. S., 64), Chicago *v.* Shel-
313 don (9 Wall., 50), Coast Line Railway Company *v.* Mayor of Savannah (30 Fed. Rep., 646), Western Paving, etc., Company *v.* Citizens' Street Railway Company (128 Ind., 525), North Western Telephone Company *v.* City of Minneapolis (83 N. W. R., 572), City Railway Company *v.* Citizens' Street Railway Company (166 U. S., 577), Los Angeles *v.* Los Angeles Water Company (177 U. S., 558), and the recent case in the United States Supreme Court (City of Detroit *et al. v.* Detroit Citizens' Street Railway Company), are all cases where an attempt was made by cities to change or destroy contracts under which franchises had been granted, and, as I conceive, in no way reach the question of taxation of the franchises as property like other taxable property.

The case of Murray *v.* Charleston (96 U. S., 62) is much relied on by the relators; but it is very far from an authority for their contention. There the City of Charleston had issued stock, generally

called bonds, agreeing therein to pay the principal, together with six per cent. interest, payable quarterly. The city was authorized by its charter "to make such assessments on the inhabitants of Charleston, or those who held taxable property within the same, for the safety, convenience, benefit and advantage of the city as shall appear to them expedient;" and, claiming to act under that authority, the city passed ordinances to the effect that the holders of its stock should be assessed the value thereof and that the amount of the tax, by virtue of such assessment in each case should be deducted by the city treasurer from the amount of interest payable upon the stock before payment and that the balance only after such deduction should be paid. It was held that the stocks could be taxed by the city like other personal property, but not in such wise as to impair the obligation of the contract; that the city was bound to pay the six per cent. and the whole of it, and could in no other way discharge its obligation; that it could not withhold a
314 portion and discharge its obligation by paying over the balance; that it was bound to pay over the interest, and not until after such complete payment and the money had become the property of the payee and under his control could it be seized for a tax against it. The judge writing the opinion said: "The obligation undertaken, therefore, was both to pay the interest at the rate specified and to pay it to the plaintiff. Such was the contract and such was the whole contract. It contained no reservation or restriction of the duty described. But the city ordinances, if they can have any force, change both the form and the effect of the undertaking. They are the language of the promisor. In substance, they say to the creditor, True, our assumption was to pay to you quarterly a sum of money equal to six per cent. per annum on the debt we owe you. Such was our express engagement; but we now lessen our obligation. Instead of paying all the interest to you, we retain a part of it ourselves and substitute the part retained for a part of what we expressly promised you. * * * Is, then, property which consists in the promise of a State or of a municipality of a State beyond the reach of taxation? We do not affirm that it is. A State may, undoubtedly tax any of its creditors within its jurisdiction for the debt due to him and regulate the amount of the tax by the rate of interest the debt bears if the promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched. But until payment of the debt or interest has been made as stipulated, we think no act of State sovereignty can work an exoneration from what has been promised to the creditor, namely, payment to him without a violation of the constitution. The true rule of every case of property founded on contract with the Government is this: It must first be reduced into possession and then it will become subject, in common with other similar property, to the right of the Government to raise contributions upon it. It
315 may be said the Government may fulfill this principle by paying the interest with one hand and taking back the amount of

the tax with the other. But to this the answer is that to comply truly with the rule the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors, and it ought, besides, to be so regulated as not to include a lien of the tax upon the fund. The creditor should be no otherwise acted upon than as every other possessor of money; and, consequently, the money he receives from the public can then only be a fit subject of taxation when it is entirely separated and thrown indistinguishable into the common mass." (See comments upon this case in 76 N. Y., 64, above cited.) This case really upholds this taxation. These franchises have forever gone from the city into the possession, control and private ownership of the grantees and are a part of the common mass of private property in the State, and, as such, are taxable without the violation of the obligation of any contract.

In the case of Hartman *v.* Greenhow (102 U. S., 672) the court considered the funding act of the State of Virginia, which provided that the coupons attached to the bonds issued by the State in pursuance of that act should be receivable at and after maturity for all taxes, debts and demands due the State, and that this should be expressed on their face. After the issuance of its bonds in accordance with the act, the legislature of Virginia passed another act, declaring that thereafter it should not be "lawful for the officer charged with the collection of taxes or other demands of the State" then due or which should thereafter become due "to receive in payment thereof anything else than gold and silver coin, United States Treasury notes, or notes of national banks of the United States." Here was a plain violation of the contract and the act was held to be unconstitutional. Subsequently the Virginia legislature passed still
316 another act providing that from the interest payable out of the Treasury on those State bonds there should be retained a tax equal in amount to fifty cents per hundred dollars of their market value; and that it should be the duty of every officer of the State charged with the collection of taxes to deduct from the matured coupons, which might be tendered to him in payment of taxes or other dues to the State, such tax as was or might thereafter be imposed on the bonds. That act was in the same case held to be unconstitutional as impairing the obligation of contracts, following the case of Murray *v.* Charleston, above cited.

The Federal Constitution provides that Federal judges shall "receive for their services a compensation which shall not be diminished during their continuance in office." During the civil war an income tax, a specific tax, was imposed upon the salaries of these judges, and the disbursing officer was required to deduct such tax from their salaries before payment, simply paying the balance. The judges protested against the deduction of the tax in the payment of their salaries on the ground that it was a diminution of their salaries, and the protest was allowed on the opinion of the Attorney-General, who said: "A specific tax by the United States upon the salary of an officer to be deducted from the amount

which otherwise would by law be payable as such salary is, in my opinion, a diminution of the compensation to be paid to him" prohibited by the constitution, and he cited Dobbins *v.* The Commissioner of Erie County (16 Peters, 435), and Pacific Insurance Company *v.* Soule (7 Wall., 434). This conclusion was reached on the same principles which guided the court in the case of Murray *v.* Charleston. It was the duty of the United States to pay the whole salary, and then, having paid it, the money thus paid at once became taxable like other property. The salaries could not be thus diminished by withholding a part thereof on any pretext. But so soon as the
317 constitutional obligation was discharged by payment and the salary had passed into the ownership of the judge it became taxable like other property. Here these franchises have passed to these corporations and they own them as their private property by an absolute indefeasible title and they may be taxed like other property.

In New Orleans City and Lake Railroad Company *v.* New Orleans (143 U. S., 192) it was held that a city ordinance imposing, pursuant to a statute of the State, a license tax upon the business of running cars for the transportation of passengers did not impair the obligation of a contract made before the passage of the statute by which the city sold to a railroad company for a large price the right of way and franchise for twenty-five years to run a railroad over certain streets and according to certain regulations, and the company agreed to pay to the city annually a real estate tax and the city bound itself not to grant during the same period a right of way to any other railroad company over the same streets. The sole authority relied upon in that case by the plaintiff in error was Gordon *v.* Appeal Tax Court (3 How. [U. S.], 133), which is also cited here by counsel for the relators. Mr. Justice Gray, writing the opinion in the New Orleans case, spoke of the Gordon case as follows: "In Gordon *v.* Appeal Tax Court (3 How., 133) upon which plaintiff in error much relied, the only point decided was that an act of the legislature con*tain*ing the charter of a bank upon condition that the corporation should pay certain sums annually for public purposes, and declaring that upon its accepting and complying with the provision of the acts the faith of the State was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock, and so much of the opinion as might, taken by itself,
seem to support this writ of error, has been explained or dis-
318 approved," citing the cases. To the same effect is the Delaware railroad tax (18 Wall., 206).

This franchise tax takes away nothing granted and it impairs no contract. The imposition of the tax is not an effort to exact more compensation for the franchise, but to compel the owners thereof to pay, in common with the other owners of property, their share of the public burdens.

It is said that the right to tax is the right to destroy, and hence that if the legislature can tax these franchises it can practically de-

stroy them, and hence nullify its grants. This legislative power is theoretically true and in theory reaches all legislative and municipal grants. But there is no danger from such a power in general laws imposing taxes upon all property. If it were attempted by special legislation, the courts could extend their protecting arm and stay confiscation under the guise of taxation, and if attempted by general laws, the people would find a remedy.

If the argument of the relators is to be carried to its logical results, then the State could never tax any franchise of any kind granted by it without impairing its contracts, and the millions which have been taken from corporations under franchise tax laws in all parts of this country during the past twenty years have been taken in violation of the Federal Constitution and have been illegally exacted.

It is said that these franchises cannot now be taxed because they were not taxable at the time they were granted. They were not by any law or contract exempted from taxation. They were property of immense value under the protection of the Government and there was no reason in their nature for exempting them from taxation. There was no contract, expressed or implied, that they should never be compelled to bear their share of public burdens like other property. The legislature, having unlimited power of taxation, may
319 increase taxation and may bring within its scope new kinds of property values and thus disappoint the plans and expectations of many in all business relations. It may for the first time impose succession or transfer taxes, income taxes and many others that can be imagined, and thus disturb business relations, investments of property and contracts between individuals in reliance upon existing laws, and yet such taxes cannot be condemned as violating the obligation of contracts. Persons who deal with the State and take grants from it do so with full knowledge of its power of taxation, and if they wish to be exempt from taxation — to any property or rights derived from the State, they must acquire such exemption by unmistakable stipulations in their contracts.

There are among these franchises some which were granted upon considerations which were stated in the grants to be in full compensation for the franchises granted, thus showing that the considerations were compensation for the property granted. No just inference can be drawn from this that the considerations were in full or instead of taxation in common with other property. The grantees of such franchises are in no better or other condition as to taxes than the grantees of other lands of the State for full compensation.

In examining this claim for exemption from taxation I could not be unmindful of the rule frequently laid down by the courts in forcible language, that such a claim must be clearly established and cannot be sustained by doubtful or uncertain implications. The claimants must point to some contract, clearly giving it in plain and unambiguous language, showing the unmistakable intention of the parties. All doubts upon the question must be resolved in favor of the right of taxation. (People *ex rel.* M. F. Ins. Company

v. The Commissioners, 76 N. Y., 64; People *ex rel.*, etc., *v.* Davenport, 91 N. Y., 574; Covington & Lexington Turnpike Co. *v.* Sanford, 106 U. S., 578; Wells *v.* Savannah, 181 U. S., 539.)

320 My conclusion, therefore, is that the assessment and taxation authorized under the act of 1899 upon the special franchises therein described do not impair the obligation of contracts.

Special Franchise Tax Cases.

Impracticability of the act.

EARL, *Referee:*

In this opinion I will deal with the contention of the relators that the act is impracticable and therefore a nullity. The contention is stated in these words: "A special franchise has no ascertainable value beyond the value of the tangible property in connection with it. The right to use the streets cannot be valued. Its value cannot be separated from the value of other property and rights. Hence the act which requires a State board to value each special franchise requires an impossibility and cannot be executed."

If the contention that the act is impossible of execution be well founded, then no authority is needed to show that it cannot have operation, and yet these authorities may be cited to that effect. (Black on Statutes, 99; People *ex rel.* N. Y. C. & H. R. R. Co. *v.* Morgan, 168 N. Y., 1; Hughes case, 1 Bland [Maryland], 46; Ward *v.* Ward, 37 Texas, 389; Chaffee's Appeal, 56 Mich., 244; State *v.* Partlow, 91 N. C., 550; Drake *v.* Drake, 4 Dev., 110.)

The argument made in favor of this contention was very able and forcible and yet it has not convinced me. The law commands these officers to value these franchises for the purpose of taxation, and it lays down no rules or methods to guide them in the discharge of their duties. It constitutes the special franchises real estate, and they are left to ascertain the value of such real estate using all the rules and means of information which local assessors may call to their aid in valuing other real estate. They are not required to resort to what in legal proceedings would be called

321 legal evidence. They may act upon hearsay, they may take the judgment of others, they may consult experts and resort to all the tests and information which they think will aid them in reaching the value with sufficient accuracy for the purpose of taxation; and they certainly can resort to all the means and evidence for the guidance of their judgment which private persons might use to reach the value of similar property in which they propose to invest their money. They may consider the cost of reproduction, the amount of business, the earning capacity, the location of the franchise, and all its advantages, and all the probabilities and possibilities relating to it, present and future. No matter what methods the assessing officers use to reach values in making their assessments the taxpayer has no grievance unless his property has

been over-valued; and for such a grievance he has his remedy by review before the assessors and a further review in the courts by a writ of *certiorari* where, in an orderly legal proceeding in which he and his witnesses can be sworn, the whole matter may be again investigated. It is hard to conceive that under such a system the value of any species of property having value cannot be reached with sufficient accuracy for the purpose of taxation. The law does not attempt the impossible. We know how bungling and imperfect the work of assessors frequently is. They are frequently ignorant and incompetent and know very little or nothing as to the value of much of the property which they are bound to assess; and as to much property they can get very little accurate information for their guidance and can do little more than guess its value. But for all these imperfections alone their work cannot be condemned. If the result of their labors, even by mere chance, is a true valuation or an under valuation, the taxpayer has no grievance; and if there be an over valuation, he has the remedies above mentioned.

322 Here these officers, conceded to be skillful, competent and honest, had whatever information they could obtain from their inspection or general knowledge of the property, and all the facts contained in the reports made to them upon their demand by these corporations, such as their chartered rights and liabilities, their gross earnings and expenses, the character, nature and value of all their tangible assets, the location and extent of their franchises, and the length of their lines and the nature of their use, the amount of their debts and their earning capacity as demonstrated by actual use. Besides all this they had, when they fixed their final valuations, such information as the corporations could give them at the time of the review before them. In the case of any of these corporations the tangible property is worth only the cost of reproduction, and what is left after deducting such cost must be mainly attributed to its intangible street franchises. Suppose assessors are bound to assess a manufacturing establishment operated by water power and they are commanded to put separate values upon the tangible property, consisting of buildings and machinery, and upon the water power. After they have ascertained the value of the entire property, using all the means to which they may resort, and then have valued the tangible property at the cost of reproduction and have deducted that from the total value may they not then take the balance as the value of the water power?

But other complications not yet noticed are alleged by the relators which are claimed, with considerable force, to render these franchises peculiarly impossible of valuation, and I will now allude to them, so far as I deem it important, in the further illustration of my views.

There were two kinds of property to be valued, the intangible franchise granted in the streets and the tangible property in, under, over, on or through the streets used in connection with such franchises; and the two kinds together were denominated in the 323 statute a "special franchise," and were required to be assessed and taxed together as a whole. It is not claimed that

there is any serious difficulty in assessing the tangible property, but the claim is that it is impossible to assess the intangible franchises.

The principal claim of the relators, as I understand it, is that any franchise granted to any of these corporations is so bound up with other matters contributing to the value of its use that its assessable value cannot be ascertained; and they mention the franchise to be a corporation. Such a franchise has very little cash value (Detroit Citizens' Street Railway Co. *v.* Common Council, 85 N. W. Rep., 96). The supply of these under general laws is unlimited. Any sufficient number of persons can organize any one of these corporations and thus potentially obtain all the corporate rights belonging under general laws to such a corporation—right to corporate existence, right to conduct the corporate business, right to consolidate and to contract with other corporations, and all other rights, privileges and franchises which belong to the corporation as such under the laws. All these franchises and privileges are of little cash value, as they may be obtained *ad libitum* at small cost by the payment of the organization tax and the expense of drafting and filing the articles of incorporation. Hence they can play a very unimportant part in valuing these street franchises. They can have value only when the corporations have obtained rights in the streets for the exercise of their corporate powers; and in valuing all the property of such corporations such value is so unimportant that the law would not take much account of it. Of course, the State can arbitrarily tax the franchise to be a corporation by special methods. But when an inquiry is set on foot as to the real value of such a franchise merely as such, it must be found to have but little more cash value, beyond the cost of incorporation, than the air we breathe.

324 It is said that the value of these franchises depends very much upon skill in their management; and as such skill cannot be valued and cannot be eliminated in the valuation of the franchises, there is great difficulty in estimating their value, as they would have little value but for skill in their management. But it is possible to obtain skill by the payment of salaries which enter into the expense of management. Such property must not be valued at what it is worth under bad management, but it may be valued at what it is worth under good management. These properties must be taken for assessment for what they are, with all their capabilities and possibilities under such management as can ordinarily be obtained. A person buying one of these franchises would consider, in fixing his price, not what it was capable of producing under poor management, but under good management. Its actual earning power, its capabilities, fix its value. It is not the use to which one of these franchises is actually put that is the sole test of its value, but the uses to which it may be put may be considered. Must a farm or any other piece of real estate be estimated for assessment for what it is worth under poor management, or what it is worth under at least fairly good management? The assessor in assessing such property must assume at least ordinary skill in its management. The producing capacity of a farm by the application of

proper skill is the fair measure of its real value and generally measures its salable value.

It is further said that the value of the use of these properties depends absolutely upon capital furnished for their operation and upon structures outside of the street. But all these things can easily be procured *ad libitum* and their cost can be ascertained. But these street franchises are generally actual monopolies. Usually they cannot be duplicated. There cannot be two railways with double tracks in the same street. At any rate, all these franchises
325 while they exist in any street without any competition therein are valuable properties. Assessors in valuing such property must take it as they find it with all its advantages, probabilities and possibilities and everything that adds value to it. They can eliminate all other property which is capable of unlimited reproduction from their consideration and thus find with sufficient accuracy for taxation its value. They can know how the franchises have been used and how they are used and the uses to which they may be put, and hence they can value them with as much accuracy as they can much other property which assessors are bound to assess.

Then again it is said that good will enters into the value of the use of these properties, and that that cannot be taxed in any case as part of the special franchise. There is no good-will here pertaining to persons. If there is any good-will it pertains to the property, and hence adds to its value. A grist-mill or saw mill situated in a place where there must be numerous patrons is valuable on that account, and the circumstances of its location with this so-called good-will would always be taken into account in fixing its value for any purpose. It matters not that some of these corporations have contracts with their customers which are valuable and conduce to their profits. Such contracts are due to the fact that they have franchises in the street, without which they could not make the contracts. They are natural advantages of the franchises, like the voluntary patronage of customers who are obliged to avail themselves of their use, and they add to their value and may be considered in their assessment. Such contracts tend to show what can be done with the franchises.

So these officers were bound to take into consideration in assessing these franchises their location and advantages for business uses and their natural patronage and earning capacity. Suppose assessors find in the hands of some taxpayer bonds of some corporation
326 which are not listed on the stock market of New York and which have not been much dealt in so as to establish a market price for them. Their value may depend upon skill in management, upon capital, upon good-will and all the contingencies which attend the franchises of the corporation. Can they in no way be valued for taxation? Their value *must* be ascertained by considering all the circumstances surrounding the corporation and affecting its ability to pay the interest and principal of the bonds when due.

It is quite true that large values have been added to some of these franchises by consolidations, lateral connections, terminal facilities and other matters growing out of present conditions. But whatever

has enhanced their values, from whatever sources such values may come, it is their present value in the streets which must be assessed for the purpose of taxation. It is not franchises in the abstract, in the air, so to speak, that are to be assessed, but it is their present capacity to earn money for which all such franchises are owned and managed that constitutes their real value.

I do not think it is any more impracticable for these officers to value these franchises than it is for a jury to value the life of a person in an action to recover a death claim. How is it possible in most cases to measure with any degree of accuracy the value of a human life? The pecuniary value of the life to the next of kin is the measure. The life might turn out to be long or short, prosperous or disastrous, efficient or inefficient, and yet the jury, considering all the circumstances, must determine such value as well as they can without any guide laid down in the law. Their verdict in any case may be, and in most cases must necessarily be a mere guess, and yet, unless they shoot wide of the mark it will be upheld.

If these franchises cannot be valued for purposes of taxation, then they cannot be valued in any way for any purpose and on that account they could never be taken in condemnation proceed-
327 ings. If any municipality of this State should judge it to be good policy to take any of these franchises, in many cases unwisely granted, for municipal use and operation, the doctrine of these relators, if sound, would forever stand in the way. The municipalities could not take them without paying their value ascertained in condemnation proceedings; and as that value could not be ascertained, it could not acquire them; and yet such franchises have been acquired by municipalities in this State, notably by the city of Syracuse, which acquired the franchises of a water company by condemnation proceedings.

My conclusion, therefore, is that there is no impossibility to assess these franchises with the reasonable accuracy expected or usual in assessing other kinds of property and in reaching other values, and I find no authority in conflict with this conclusion. In The People *ex rel.* U. V. Copper Co. *v.* Feitner (54 App. Div., 217), Judge Rumsey said: "By the express terms of the statute a party can only maintain a *certiorari* to review an assessment when it has been aggrieved by it. The theory upon which the assessment is made is of no importance. The only question to be examined in a case like this is whether the relator can be said to be aggrieved because the amount of the assessment is too large." In The People *ex rel.* Subway Co. *v.* Barker (7 App. Div., 27), it was said that the action of the tax commissioners in assessing the capital of a corporation "must be based upon facts and evidence before them, and must not be capricious, arbitrary or fanciful." This was said in a case where the corporation had placed facts and evidence before the commissioners which were admitted to be true and from which they could ascertain the value of its capital. The language quoted, standing alone and literally construed, does not state the law accurately. No matter by what methods the assessors reach their conclu-

sion, if the assessment is not too high there is no grievance.
328 Suppose "by capricious, arbitrary or fanciful methods" they assess property at $10,000 which is worth $20,000, is the taxpayer aggrieved? In People *ex rel.*, etc., *v.* Barker (48 N. Y., 70), Judge Hunt, speaking of the duty of assessors in assessing property, said: "They form their own judgment of the value of each piece of real estate and place it in the third column of their assessment roll. This judgment they form from the best information in their power derived from their own knowledge and experience and from such communications as they may confide in." In People *ex rel.* Powers *v.* Kalbfleisch (25 App. Div., 432), it was held that in assessing for the purpose of taxation a very valuable building which cannot be said to have a market value, its earning capacity can be considered. To show how uncertain the estimates of the value of even tangible property may be, the witnesses in that case upon the trial before the referee varied in their estimates as to the value of the land upon which the buildings stood from $233,000 to $650,000, and as to the present cost of erecting the building from $400,000 to nearly $900,000. In The People *ex rel.*, etc., *v.* Coleman (107 N. Y., 541), a case where the assessors were required to assess the capital stock of a corporation, it was held: "The law does not prescribe how the actual value of the capital stock of a corporation is to be ascertained. That is left to the judgment of the assessors, and in appraising the actual value they have a right to resort to all the tests and measures of value which men ordinarily adopt for business purposes in estimating and measuring the values of property. They may take into account the business of the corporation, its property, the value of its actual assets, the amount and nature of its present and contingent liabilities, the amount of its dividends and the market value of its shares of stock in the hands of individuals." The People *ex rel.* U. T. Co. *v.* Coleman (126 N. Y., 433), is author-
329 ity for holding that where there is no definite measure for valuing a franchise and the precise value is unknown, the value of the share stock and the general condition of the company may be considered, and in such a case the assessors have a right to resort to all the tests and measures of value which men ordinarily adopt for business purposes in estimating and measuring values of property. They may take into account the business, its property, the amount of its dividends and the market value of its shares of stock in the hands of individuals. In The People *ex rel.* the Edison Electric Illuminating Co. *v.* Barker (139 N. Y., 55), a case involving the assessment of capital stock, Judge Peckham, speaking of a case where sufficient facts were disclosed from which the value of the capital stock could be accurately ascertained, said:

"Under such circumstances and for this purpose of assessment the market price of the shares of the stock into which the capital is divided is not material, nor the amount of the dividends which may have been paid by the company. These are not the subject of taxation under the law relating to the assessment of corporations, and such facts are immaterial when the exact data are given from which

the value of the capital can be accurately ascertained. In the absence of these exact data the facts just stated, as well as others, may be looked at for the purpose of obtaining from them, as well as the nature of the facts will permit, what is the value of the capital and surplus, if any there be." Yet the earning of dividends depends largely upon skill in management and upon good-will. In People *ex rel.* the Equitable Gas Co. *v.* Barker (144 N. Y., 94), dividends and earning capacity were considered in valuing corporate property for taxation. In People *ex rel.* M. R. Co. *v.* Barker (146 N. Y., 304), it was held that in making an assessment upon the capital stock of a corporation under the act, chapter 456 of the Laws of 1857,
330 the earnings of the corporation may be considered by the assessors and that when it appeared that its earnings enabled it to pay its running expenses, necessary repairs and interest on its indebtedness and to declare a dividend of six per cent. and still have a surplus, it was proper to assume that its capital stock remains unimpaired and that there are surplus assets sufficient to pay its outstanding indebtedness. There, again, were involved the incidents of skill in management and good-will. In State railroad tax cases (92 U. S., 575), the assessments there in question were required to be on the capital stock of corporations according to the fair cash value of such capital stock, including the franchise over and above the assessed value of the tangible property of the corporation, and there it was held: "That the capital stock, franchises and all the real estate and personal property of corporations are justly liable to taxation, and a rule which ascertains the value of all this by ascertaining the cash value of the funded debt, and of the shares of the capital stock as the basis of assessment, is probably as fair as any other. Deducting from this the assessed value of all the tangible real and personal property, which is also taxed, leaves the real value of the capital stock and franchise subject to taxation as justly as any other mode, all modes being more or less imperfect." There also were present as factors bearing upon values skill in management and good-will.

I repeat, these assessors were not bound to view these franchises as abstractions apart from any use to which they could be put. But they had the right to consider, and as faithful officers were bound to consider, the uses for which they were intended in the streets, and to which they had been actually applied. Suppose what constitutes the special franchise of any one of these corporations should be put in the market for sale? Can it be doubted that it would sell for a substantial price, a sum which business men could deter-
331 mine with sufficient accuracy for business purposes? Hence, I think it is clear that these special franchises could be assessed for the purposes of taxation. The assessment is undoubtedly attended with great difficulties. But it can be made with such an approximation to accuracy as will satisfy all the requirements of the law and of the constitution. These officers could place some value upon them, and whether there was any over-valuation will be considered later.

Special Franchise Tax Cases.

Objections not before considered.

EARL, *Referee:*

In this opinion I will deal with general objections to these assessments, not considered in prior opinions.

1. Most of these relators had, under the laws of this State, prior to these assessments, acquired by consolidations the street franchises of other corporations, and although they thus became the owners of such franchises, they now claim that under the special franchise tax act such franchises should have been separately assessed and not as one franchise, in the ownership of the corporation thus acquiring them; and that, therefore, the assessments in all such cases are illegal.

A special franchise is defined in the statute (chapter 712, Laws of 1899) to be a "franchise, right, authority or permission," to use "streets, highways or public places," for the purposes mentioned in the act, and it is deemed to include the value of the tangible property in any street, highway or public place, used in connection with the franchise.

The State Board of Tax Commissioners is commanded annually to "fix and determine the valuation of each special franchise
332 subject to assessment, in each city, town, village or district," and to "file with the clerk of such city, town or village a written statement of the valuation of each special franchise in such city, town or village or tax district, as fixed and determined by such board," and "each city, town or village clerk" is commanded to deliver a copy of such statement to local assessors "in each tax district."

Then it is further provided that the owners of these taxable franchises shall make a report to the tax commissioners "containing a full description of every special franchise" possessed or enjoyed by them, "a copy of the special law, grant, ordinance or contract under which the same is held, or, if possessed or enjoyed under a general law, a reference to such law, a statement of any condition, obligation or burden imposed upon such special franchise, or under which the same is enjoyed."

This act should be so construed, if possible, as to make it practicable and operative, and to give effect to the legislative intention. If each special franchise, when there are several belonging to any one of these relators, must be separately assessed, then the difficulties attending the execution of the act are vastly increased, if not insuperable.

I think by the language used it is the plain purpose of the act to secure the assessment of "each" and "every" franchise—all the franchises. If it had been the intention that every franchise as granted should be separately assessed, a matter of so much practical importance would have been made plain by the use of the ap-

propriate word "separately." There is nothing in the nature of assessments or of property which requires that all separate pieces of property shall be separately assessed. All the personal property of an owner, however multifarious, is grouped together and valued as a whole, and so there is no general provision in the tax laws of this State which requires separate parcels of land, owned by the same person, to be always separately assessed. A farmer may
333 own (not a very unusual circumstance) a wood lot or a pasture lot, near his main farm, and used therewith, and it cannot be doubted that such lot may be legally assessed with the farm as part thereof.

A corporation owning a franchise becomes the owner of other franchises by consolidation, and thus enlarges the franchise which it previously owned—just as a farmer may buy other lands adjoining his farm and thus enlarge his farm—all the lands becoming assessable as one body of land. These franchises, after the consolidations, belonging to one corporation, were used and managed together as one piece of property. They were in no way kept distinct. There was nothing in the streets to distinguish one from another. There was no separation of their earnings in separate accounts, and such earnings all went into the same treasury as common funds. The tangible property in the streets of all these franchises so combined in one ownership, had previously to this act been assessed as one piece of property, and this fact, together with the manner of the use and management of the property, must have been known to the lawmakers when this law was enacted.

The fact that the separate franchises thus combined may have different conditions attached to them, and have upon them separate mortgages and other burdens, does not render their taxation as one property impracticable, and any inconvenience expected to flow from such taxation is more imaginary than real. Several adjoining farms, with different conditions, mortgages and other burdens affecting them, may be combined and taxed as a whole, and so may adjoining city lots, and no inconvenience or embarrassment of any kind follow, as no inconvenience or embarrassment ever did follow, so far as I am informed, from the taxation as real estate of the tangible property of these corporations in the streets as a whole.

But for the purpose of making this act practicable, I think a still broader view may be taken. After these consolidations were
334 effected, and ownership of several franchises became thereby vested in one corporation, such corporation had "right, authority and permission," under the laws, to use and operate as owner all these franchises in the streets together as a whole, and it did so use and operate them, and no power could prevent it. Such "right, authority and permission" came within the definition of a special franchise which was required to be assessed.

It may be conceded that under the general laws of the State, as it has always been understood and practiced, separate, detached pieces of land owned by the same person and separately used and

occupied, must be separately assessed. This rule applies to land having a visible *situs* and boundary. But the rule is not, I think, applicable to real estate such as these franchises, which have no circumscribed *situs* and are used and managed in common as part of one system.

There is no special provision of law applicable to the city of New York which requires franchises owned, used and managed together by one corporation to be separately assessed for purposes of taxation. The only provision I find in the city charter is in section 889, which makes it the duty of the deputy tax commissioners to assess all the taxable property in the several districts, and to furnish to the board of taxes and assessments "a detailed statement of all such property, showing that said deputies have personally examined each and every house, building, lot, pier or other assessable property, giving the street, lot, ward, house and map number of such real estate embraced within said districts, together with the name of the owner or occupant, if known."

This section is not applicable to assessments made by these State officers. If it were, it would not require them to assess separately these franchises owned, used and managed together as a whole, and having no circumscribed *situs*, no lot number, and laid down on no tax map; and under this section the tangible property in the
335 streets, used with these franchises before the passage of this act and assessable as real estate, were never separately assessed.

In the case of May *v.* Traphagan (139 N. Y., 478), to which my attention has been called, the Brooklyn city charter required the local assessors to make ward maps, designating thereon, for the purpose of assessment, city lots by their numbers, and the assessments were required to refer and conform to such maps. In making the assessment there in question, the assessors assessed two lots as one, instead of assessing the two separately by their map numbers, as required by the law, and the assessment was held illegal. That case has no bearing upon the question I am now considering. In People *ex rel.* Lazarus *v.* Feitner (65 App. Div., 318) six lots situated in the city of New York, belonging to different persons and designated separately upon the tax map of the city by separate numbers, were covered entirely by a single building, occupied by one individual, and as it was impracticable to apportion the value of the building among the various lots upon which it stood, it was held that the six lots could be assessed in bulk. That case is some authority for the contention of the defendants that where several franchises are owned by one corporation under one control, combined into one system and operated together, and it is impracticable to assess them separately, they may be assessed in bulk.

2. It is said that these State officers did not adopt any rule or method in making these assessments, and that, therefore, they should be set aside. There is no law or authority which requires assessors, in making assessments, to adopt any certain or fixed rule or method. The only rule for their guidance is the actual value of property to

be assessed, and they may avail themselves of all tests of such value within their reach, and of every fact, and all information which in their judgment has any bearing upon such value. If, in as-
336 sessing these franchises, these officers included with them the value of any other property, thus enhancing their value, their assessments would be illegal. This I do not understand they did. I cannot find that they assessed any values but the special franchises, but in assessing them they considered several incidental matters, such as earning capacity, business advantages, etc., all bearing upon their value. If the local assessors throughout the State are bound to adopt some certain rule or method in reaching assessable values, and if their assessments must fail unless, when questioned, they can state some certain rule or method by which they were guided, I believe a large share of their assessments would fail to withstand the assaults of the taxpayers. All that such assessors could say when questioned is substantially what these officers have said here, that they availed themselves of such information as they could obtain as to values, and then fixed them according to their best judgment. Assessments when thus made are not illegal. They may be too high, and for that the remedy is by review. It is only when undisputed facts are before the assessors, and by adopting some wrong rule or method they disregarded such facts and thus enhanced their assessments, or when, by adopting a wrong rule or method, they included in their assessments some element of value not belonging there, that the courts have condemned assessments for the use of an improper rule or method. (People *ex rel.* the Manhattan Railway Co. *v.* Barker, 48 App. Div., 248; People *ex rel.* Union Trust Co. *v.* Coleman, 126 N. Y., 195; People *ex rel.* Edison Electric Illuminating Co. *v.* Barker, 139 N. Y., 55; People *ex rel.* Edison Gen'l Electrical Co. *v.* Barker, 141 N. Y., 251; People *ex rel.* Manhattan Railway Co. *v.* Barker, 146 N. Y., 304; People *ex rel.* Manhattan Railway Co. *v.* Barker, 152 N. Y., 417; People *ex rel.*, etc., *v.* Dederick, 161 N. Y., 195.)

337 Here the same rule was adopted by these officers in all cases, to wit: To use all the tests of values, and all the facts and information bearing upon values, and then to fix the fair values of the franchises, including no other property, using their best judgment, and no decision condemns such an assessment. The judgment thus exercised is the same kind of judgment which local assessors generally exercise. In many cases it must be little better than a conjecture or guess, like the verdict of a jury in an action upon a death claim, and in other cases, or the judgment of a large proportion of men who deal in stocks and securities in Wall street and in other large business transactions, and the only remedy of the aggrieved taxpayer is by review. A precise rule or method, an infallible or accurate judgment, in such matters is impossible.

3. It is said that these assessments are illegal because no proper hearing was given to the relators at the time of review before these officers. The complaint is that they did not inform the relators upon what "basis, theory, rule or principle" they proceeded in mak-

ing the assessments, and what was in any case the value separately of the tangible property and of the street franchises which were required to be assessed together. I know of no rule that requires assessors, on grievance day, to give an aggrieved taxpayer any information except what appears in the assessment roll. The taxpayer knows of the assessment and its amount, and he is present before the assessors to show that his assessment is illegal, or too high, and he has the burden as to both of these, and to establish his claim he has no legal right to catechise the assessors or ask their aid. If he has any grievance he is supposed to know what it is, and to be able to place, by his own oath or the evidence of witnesses, the necessary facts before the assessors. A party seeking before any judge in any way to review or overhaul his decision, has no legal right to question him as to the methods and rules used in reaching
338 his decision, and yet he could have a hearing and would not be deprived of due process of law.

4. The objection that the relators did not have due process of law in the taxation of their property is without foundation. They had notice of the assessments and a hearing on grievance day, and opportunity to produce all their evidence before the commissioners, and they have a further hearing upon the whole case in these proceedings now pending before me, and all this within the most stringent rules to be found in any authority, constitutes, for such a case, due process of law (Stewart *v.* Palmer, 74 N. Y. 183). And they have also had the equal protection of the laws within the meaning of the 14th amendment of the Constitution.

5. The act we are now considering is simply an amendment of the general tax law. It imposes no tax and appropriates or applies no money to any object, and therefore does not violate section 24 of article 3 of the constitution, which requires that "every law which imposes, continues or revives a tax, shall distinctly state the tax and the object to which it is to be applied" (In matter of McPherson, 104 N. Y., 306; Jones *v.* Chamberlain, 109 N. Y., 100). If this objection could avail, I do not see why it would not condemn the whole chapter of laws of which the special franchise tax is simply an amendment.

My conclusion, therefore, is that there is nothing in these general objections, so far considered, showing the illegality or invalidity of these assessments.

6. These franchises were all assessed at what these officers deemed to be their full and true value, while other real estate in the municipalities in which these franchises are operated was assessed
339 by the local assessors at less than its full and true value, and so these assessments will have to be reduced at least so much as will equalize them with the other assessments in the same localities. In New York the assessment of other real estate was sixty-seven per cent of its full and true value; in Kings, sixty-eight per cent.; in Queens, eighty per cent.; in Richmond, sixty-six per cent., and in Westchester, ninety per cent.

If I find that these officers have in any cases assessed franchises

at more than their full and true value, my conclusions as to such assessments will be found in my opinions and findings in such cases.

Exceptions to Referee's Report.

Supreme Court, Albany County.

PEOPLE *ex Rel.* NEW AMSTERDAM GAS Company *against* THE STATE BOARD OF TAX COMMISSIONERS.	Exceptions to Referee's Report. Assessment of 1900. No. —.

The relator herein, saving and reserving all objections to the manner and form of the findings of fact and conclusions of law of the referee herein not herein precisely and exactly specified, files the following exceptions to the same:

(1.) The relator specifically excepts to the referee's 16th finding of fact and to each and every part thereof, and without limiting
340 this exception further specifically excepts to so much of said 16th finding as finds that the respondents considered the market value of the relator's stocks and bonds for what it might be worth and not as conclusive, or as an absolute measure of valuation, further specifically excepts to so much of said 16th finding as finds that the respondents in assessing the special franchise of the relator, and in arriving at the valuation thereof, did not include in such assessment the valuation of any property except as in, above, upon, under or running through the public streets and public places of said city, including the franchises, rights, authority or permission to construct, operate and maintain its foundation, roadbed, substructure and superstructure, with their appliances in, upon, above, under or through said streets and public places; and further specifically excepts to so much of said 16th finding as finds that the respondents did not include in such assessment or valuation the value of the right to be or the franchise to be a corporation, and further specifically excepts to so much of said 16th finding as finds that the respondents did not include the value of the good-will of the business carried on by such corporation, nor did the respondents include the value of any property other than that stated and described in said 16th finding as having been included by them, and further specifically excepts to so much of said 16th finding as finds that such assessment as made by such special franchise of the relator includes the value of the tangible and intangible property in the streets of the city of New York, and was arrived at upon consideration of all the facts and circumstances affecting the value of such property, including the use of the right to use such public streets and public places which the respondents were able to ascertain.

(2.) The relator specifically excepts to the referee's 19th finding

of fact, and to each and every part thereof; and further spe-
341 cifically excepts to so much of said 19th finding as finds "that the actual and true value of the special franchise of the relator as finally determined by the defendants, and as I find, is $437,433 in the borough of Queens, and $3,989,182 in the borough of Manhattan, making a total of $4,426,615."

(3.) The relator specifically excepts to the referee's 24th finding of fact, and specifically to so much of said 24th finding that finds or implies that the value of the relator's special franchise is $437,433 in the borough of Queens, and $3,989,182 in the borough of Manhattan, and that the sum to be deducted is $144,352 in the borough of Queens and $1,316,490.06 in the borough of Manhattan, and that $293,081 is the value of the relator's special franchises in the borough of Queens for the purpose of assessment and taxation under the special franchise tax act, and that $2,672,711.94 is the value of the relator's special franchise in the borough of Manhattan for the purpose of assessment and taxation under the special franchise tax act. The relator, however, does not except to so much of said 24th finding as finds or implies that other real estate in the city of New York was assessed at only 67 per cent. of its actual and true value, and that to equalize the relator's assessment with the assessment of such other real estate a deduction of 33 per cent. should be made from the actual value.

(4.) The relator specifically excepts to the 1st conclusion of law as found by the referee, and as to the whole thereof as against the evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(5.) The relator specifically excepts to the 2d conclusion of law as found by the referee, and as to the whole thereof, as against the evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

342 (6.) The relator specifically excepts to the 3d conclusion of law as found by the referee, and to the whole thereof, as against the evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(7.) The relator specifically excepts to the 4th conclusion of law as found by the referee as against the evidence, contrary to the evidence, against the weight of evidence and unsupported by the evidence, except to so much thereof as finds or implies that the relator is entitled to a reduction from the actual value of its special franchise for the purpose of equalizing its assessment with the assessment of other real property in the city of New York.

Dated New York, Oct. —, 1902.

JOHN C. TOMLINSON,
Attorney for Relator, 15 Wall Street, Borough of Manhattan, New York City.

To John Franey, Esq., county clerk.
To Hon. John C. Davies, attorney-general, attorney for respondents.

343 Supreme Court, Albany County.

PEOPLE *ex Rel.* THE NEW AMSTERDAM GAS Company *against* THE STATE BOARD OF TAX COMMISSIONERS. } Notice of Trial. Assessment of 1900. No. 15.

SIR: Please take notice, that upon the report of Hon. Robert Earl, the referee herein, and upon the petition, writ of *certiorari*, return, the evidence and proceedings before the referee, and all the papers and proceedings herein, we shall move before this honorable court at a special term thereof, to be held at the county court-house, in Albany county, on the — day of ——, 1902, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, that the court proceed to hear, try and determine this proceeding; and you will

Further please take notice, that we shall then and there bring on this proceeding to a hearing and trial, and shall move for a final order confirming the assessment made herein on or about the 30th day of April, 1900, and for such other or further relief or both, as to this court may seem to be just and proper in the premises.

Dated —— —, 1902.

JOHN C. DAVIES,
Attorney-General, Attorney for Respondents, Albany, New York.

To John C. Tomlinson, Esq., attorney for relator.

344 *Decision.*

Supreme Court, Albany County.

PEOPLE *ex Rel.* NEW AMSTERDAM GAS COMPANY *against* THE STATE BOARD OF TAX COMMISSIONERS. }

An order of reference having been made herein and entered in the office of the clerk of Albany county on the 18th day of April, 1901, by which it was referred to Hon. Robert Earl, as referee, to take and report to this court such evidence upon the several issues of fact raised by the petition, writ and return herein as might be adduced before him by either of the parties hereto, with his findings of fact and conclusions of law, and the said referee, pursuant to said order, having filed his report and the evidence and proceedings taken by and before him, in the office of the clerk of Albany county on the — day of October, 1902, and exceptions having been filed to said report, and this proceeding having come on for a hear-

ing, trial and final determination before the court, at a special term thereof, held by the undersigned without a jury,

Now, after hearing counsel for the relator and for the respondents respectively, and findings of fact and conclusions of law having been proposed by the relator, I decide and find *pro forma* as follows:

345 *Findings of Fact.*

1. At the times herein mentioned the New Amsterdam Gas Company (herein also called the relator) was, and still is a corporation, created and existing under and pursuant to the laws of the State of New York, and has its principal office in the city of New York.

2. Said company is a corporation formed and organized in 1897 by the consolidation of the following named corporations: Equitable Gas Light Company of New York, the New York and East River Gas Company and the New Amsterdam Gas Company.

3. That the said Equitable Gas Light Company, the said New York and East River Gas Company and the said New Amsterdam Gas Company were, prior to such consolidation, separate corporations theretofore organized and existing under the laws of the State of New York.

4. The right of the relator to lay and maintain its mains in the streets of the city of New York depend upon its ownership through consolidation of the franchise of the Equitable Gas Light Company of New York and the franchise of the East River Gas Company of Long Island City, the former having been granted by an ordinance of the common council of said city, dated December 26, 1882, and the latter by an act of the legislature of the State of New York, chapter 338 of the Laws of 1892, and the said right of the relator to lay and maintain its pipes in the streets of the said city of New York are subject to the conditions which are fully set forth in the ordinance and statute referred to, which ordinance and statute are in evidence.

5. Neither the relator nor any of its constituent companies did in fact construct, maintain or operate gas pipes in all the streets of the city of New York.

346 6. The relator has filed with the State Board of Tax Commissioners all reports required by law or required to be filed by the commissioners. Copies of such reports are in evidence and reference is made thereto for their contents.

7. On or about March 6, 1900, the State Board of Tax Commissioners, claiming to act under and pursuant to the provisions of chapter 712 of the Laws of 1899, proceeded to fix and determine the valuation of the special franchises of the relator at the sum of $5,561,750, and did thereupon make the assessment of such special franchise at the sum aforesaid.

8. Immediately after making such assessment the State board gave notice to the relator in writing, stating that such assessment had been made and that the total valuation of the relator's special

franchise was $5,561,750, and that the State board would meet at its office in the city of Albany on March 29, 1900, to hear and determine any complaint concerning such assessment.

9. The relator company by its counsel appeared pursuant to such notice, at the time and place therein stated, before the State board, and requested to be informed by the board concerning and as to what was the amount which said board had determined to be the valuation of the tangible property of the relator company and as to what was the amount fixed and determined by the board to be the valuation of the intangible franchises, rights and permissions of the relator company and as to what was the method, rule or principle, if any, adopted and applied in ascertaining and determining the valuation; but the board refused to give the relator company the whole or any part of the information so requested.

10. Thereupon the relator company complained of the said
347 assessment and filed with the State board a written statement under oath, specifying the grounds of its complaint.

11. Thereafter, and on or about April 28, 1900, the State board, still claiming to act pursuant to chapter 712 of the Laws of 1899, finally determined the valuation of the special franchises of relator to be the sum of $437,433 in the borough of Queens and $3,989,182 in the borough of Manhattan, making a total of $4,426,615, and on or about April 30, 1900, filed in the department of taxes and assessments of the city of New York a written statement of such valuations as finally fixed and determined by the State board, and at or about the same time gave notice to the relator company that such written statement had been filed with the department of taxes and assessments of the city of New York.

12. Thereafter, the commissioners of taxes and assessments of the city of New York prepared the assessment rolls of the real and personal property of the several parts of the city for the year 1900, and entered thereon before the final review or certification of such rolls by them, the valuation of such special franchises of the relator as filed by the State board, and having annexed thereto their certificate that the assessment rolls were correct in accordance with the entries of its several books of records in that department, duly verified the same, and delivered such assessment rolls to the municipal assembly of New York city, as required by law, on the first Monday of July, 1900.

13. Within fifteen days after the final completion and filing of the assessment rolls in the city of New York, the relator company applied for a writ of *certiorari* to review the assessment, pursuant to which writ this proceeding is pending.

14. The State board did not make a separate valuation or
348 assessment of each franchise, right, privilege or permission owned by the relator, but made one valuation or assessment covering the special franchise of the relator in the streets of the city of New York, and valued the special franchise owned by the relator on January 8, 1900, at the sum of $3,989,182, and in the borough of Queens at the sum of $437,433, making a total of $4,426,615.

15. In making such assessment against the relator the State board fixed upon a certain figure as covering the value of the tangible and intangible property together, and did not separately arrive at a valuation of the tangible and intangible parts respectively.

16. The defendants valued the property of the relator at what they deemed its full and fair value, taking into consideration the original report made by it to the board, subsequent supplemental or special reports, the reports of the New York City department of assessment and taxes, and after consideration of information from experts retained by the board and of their confidential appraisers and special agents. And they also had before them the *Financial Chronicle*, and considered all the elements, factors and considerations which they were enabled to gather from these sources. They based their valuation of the tangible property solely upon the cost of reproduction with an allowance for depreciation.

They considered the market value of its stocks and bonds for what it might be worth, and not as conclusive or as an absolute measure of valuation. They considered the earning power of the property of the company as reported to them by it. They considered the tax rate in New York county, and also the net and gross earnings, and the fact whether the earnings were large or small, and assessed the special franchise at what the members of the board agreed was the full and fair value thereof.

In addition to these facts, which were before the commis-
349 sioners previous to the hearing of relator, the commissioners had upon and after said hearing before them, and considered the statements, evidence, affidavits and arguments upon such hearing for the purpose of arriving at their final conclusion as to the valuation of relator's special franchise.

In assessing the special franchise of the relator, and in arriving at the valuation thereof, the defendants did not include in such assessment the valuation of any property except such as is in, above, upon, under or running through the public streets and public places of said city, including the franchises, rights, authority or permission to construct, operate and maintain its pipes and mains in, upon, above, under or through said streets and public places. They did not include in such assessment or valuation the value of the right to be or the franchise to be a corporation. They did not include the value of the good-will of the business carried on by such corporation nor did they include the value of any property other than that above stated and described as having been included by them. Such assessment as made by them of such special franchise of the relator includes the value of the tangible and intangible property in the streets of the city of New York, and was arrived at upon consideration of all the facts and circumstances affecting the value of such property, including the use or right to use such streets and public places which the defendants were able to ascertain.

17. On January 8, 1900, the relator's property consisted of stocks and bonds of other companies, real estate including that embraced in its special franchise, materials and supplies, con-

tracts, patents, good-will and franchises of various kinds, including the special franchise.

18. The annual gross earnings of the relator for the year 1899 were $1,847,379.95. Such earnings are derived from the combined use and operation of its entire system and of all its property embraced therein.

350 19. The actual and true value of the special franchise of the relator, as finally determined by the defendants and as I find was $437,433 in the borough of Queens, and $3,989,182 in the borough of Manhattan, making a total of $4,426,615.

20. The tangible property of the relator included in the special franchise had for many years been entirely assessed by the local assessors in the city of New York.

21. On January 8, 1900, there were in operation in the city of New York other gas companies than the relator, and all of said gas companies had the franchise, right, permission and authority to construct, maintain and operate gas pipes and mains in the streets and avenues of New York city, as the same had been granted to them by the statutes under which they were organized, and the special statutes relating thereto, which are hereby made a part of this finding.

22. All of the aforementioned companies had pipes and mains in the streets of New York on the 1st day of January, 1900, and some of the streets occupied by the pipes and mains of the relator were also occupied by the pipes and mains of some of said companies, and said companies competed with the relator, and with each other, but none of said companies occupied all the streets of New York.

23. The State Board of Tax Commissioners had made the following assessments of the special franchises of the above-mentioned companies for the year 1899:

The New York Mutual Gas Light Company	$2,326,174
The Standard Gas Company	3,127,790
The Consolidated Gas Company	13,950,000

351 24. Other real estate in the city of New York was assessed at only 67 per cent. of its actual and true value, and, therefore, to equalize this assessment with the assessment of such other real estate there should be deducted from the $437,433 in the borough of Queens the sum of $144,352 and from the $3,989,182 in the borough of Manhattan the sum of $1,316,430.06, and there remains as the value of the special franchise of the relator for the purposes of assessment and taxation under the special franchise tax act in the borough of Queens the sum of $293,081 and in the borough of Manhattan the sum of $2,672,751.94.

25. The following is a correct statement of the assessed value of real estate in the State and in the city of New York, respectively, for the years hereinafter stated:

Total assessed real estate in State for 1899	$4,811,593,059
Total assessed real estate in State for 1900	5,093,025,771
Total assessed value of all special franchises in State for 1900	266,202,759
Total assessed value of tangible property for year 1899 included in the special franchises assessed in 1900 for whole State	96,961,902

Total assessed value of real estate in New York city by boroughs for 1899.

Manhattan and Bronx	$2,178,605,905
Kings	609,822,267
Queens	103,752,600
Richmond	40,264,692
Total	$2,932,445,464

352 Total assessed value of all real estate in the city of New York, exclusive of tangible property included in the special franchise by boroughs for the year 1900.

Manhattan and the Bronx	$2,369,997,504
Kings	651,383,900
Queens	104,427,872
Richmond	42,723,924
Total	$3,168,533,200

Total assessed value of all special franchises in the city of New York, by boroughs, for the year 1900.

Manhattan	$166,763,669
Bronx	7,272,249
Brooklyn	36,743,057
Queens	6,544,312
Richmond	2,356,064
Total	$219,679,351

Total assessed value of the tangible property for the year 1899 included in the special franchises assessed in 1900 for the city of New York, by boroughs.

Bronx	$3,768,600
Brooklyn	18,048,775
Manhattan	50,428,750
Queens	2,935,600
Richmond	1,403,500
Total	$76,585,225

353 *Conclusions of Law.*

1. Chapter 712 of the Laws of 1899, is a valid and constitutional enactment, practicable and operative, and it gave authority to the defendants to assess the relator's special franchise for the purposes of assessment and taxation.

2. The relator had a hearing and due process of law before the defendants upon the review of their assessment on the 10th day of April, 1900, and was not there deprived of any of its legal or constitutional rights.

3. It was lawful to assess as one franchise the franchise, right, authority, or permission which the relator had in the streets of New York, and which it operated as one system.

4. To equalize its assessment with the assessment of other real property in the city of New York, the relator is entitled to a reduction from the assessment of $437,433 in the borough of Queens, the sum of $142,352, and from the assessment of $3,989,182 in the borough of Manhattan, the sum of $1,316,430.06, and as thus reduced the sum of $293,081 must be taken as the value of the relator's special franchise in the borough of Queens, and the sum of $2,672,751.94 as the value of the relator's special franchise in the borough of Manhattan for the purposes of assessment and taxation under the act above referred to, and the necessary correction should be made to that end in the assessment roll and tax books in the city of New York for the boroughs mentioned.

D. CADY HERRICK,
Jus. Sup. Ct.

Dated Albany, October —, 1902.

354 *Exceptions to Decision.*

Supreme Court, Albany County.

PEOPLE *ex Rel.* NEW AMSTERDAM GAS COMPANY *against* THE STATE BOARD OF TAX COMMISSIONERS. } Assessment of 1900. No. —. Exceptions to Decision.

The relator herein, saving and reserving all objections to the manner and form of the decision, findings of fact and conclusions of law of the court herein not herein precisely and exactly specified, files the following exceptions to the same:

(1.) The relator specifically excepts to the court's 16th finding of fact and to each and every part thereof, and without limiting this exception further specifically excepts to so much of said 16th finding as finds that the respondents considered the market value of the relator's stocks and bonds for what it might be worth and not as

conclusive, or as an absolute measure of valuation, further specifically excepts to so much of said 16th finding as finds that the respondents in assessing the special franchise of the relator, and in arriving at the valuation thereof, did not include in such assessment the valuation of any property except as is in, above, upon, under or running through the public streets and public places of said city, including the franchises, rights, authority or permission to construct, operate and maintain its foundation, roadbed, substructure and superstructure, with their appliances in upon, above, under or through said
355 streets and public places; and further specifically excepts to so much of said 16th finding as finds that the respondents did not include in such assessment or valuation the value of the right to be or the franchise to be a corporation; and further specifically excepts to so much of said 16th finding as finds that the respondents did not include the value of the good-will of the business carried on by such corporation, nor did the respondents include the value of any property other than that stated and described in said 16th finding as having been included by them, and further specifically excepts to so much of said 16th finding as finds that such assessment as made by such special franchise of the relator includes the value of the tangible and intangible property in the streets in the city of New York, and was arrived at upon consideration of all the facts and circumstances affecting the value of such property, including the use or the right to use such public streets and public places which the respondents were able to ascertain.

(2.) The relator specifically excepts to the court's 19th finding of fact, and to each and every part thereof; and further specifically excepts to so much of said 19th finding as finds "that the actual and true value of the special franchise of the relator as finally determined by the defendants, and as I find is $437,433 in the borough of Queens, $3,989,182 in the borough of Manhattan, making a total of $4,426,615.

(3.) The relator specifically excepts to the court's 24th finding of fact, and specifically to so much of said 24th finding that finds or implies that the value of the relator's special franchises is $437,433 in the borough of Queens, and $3,989,182 in the borough of Manhattan, and that the sum to be deducted is $144,352 in the borough of Queens and $1,316,410.06 in the borough of Manhattan, and that $293,081 is the value of the relator's special franchises in the
356 borough of Queens for the purpose of assessment and taxation under the special franchise tax act, and that $2,672,711.94 is the value of the relator's special franchises in the borough of Manhattan for the purpose of assessment and taxation under the special franchise act. The relator, however, does not except to so much of said 24th finding as finds or implies that other real estate in the city of New York was assessed at only 67 per cent. of its actual and true value, and that to equalize the relator's assessment with the assessment of such other real estate a deduction of 33 per cent. should be made from the actual value.

(4.) The relator specifically excepts to the 1st conclusion of law as found by the court, and as to the whole thereof, as against the evi-

dence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(5.) The relator specifically excepts to the 2d conclusion of law as found by the court, and as to the whole thereof, as against the evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(6.) The relator specifically excepts to the 3d conclusion of law as found by the court, and to the whole thereof, as against the evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(7.) The relator specifically excepts to the 4th conclusion of law as found by the court, as against the evidence, contrary to the evidence, against the weight of evidence and unsupported by the evidence, except to so much thereof as finds or implies that the relator is entitled to a deduction from the actual value of its special
357 franchise for the purpose of equalizing its assessment with the assessment of other real property in the city of New York.

Dated New York, October —, 1902.

JOHN C. TOMLINSON,
Attorney for Relator,
15 *Wall St., Borough of Manhattan, City of N. Y.*

To John Franey, Esq., county clerk.
To Hon. John C. Davies, attorney-general, attorney for respondents.

Final Order.

At a special term of the supreme court of the State of New York, held in and for the county of Albany, at the county court house, in the city of Albany, on the — day of October, 1902.

Present: Hon. D. Cady Herrick, justice.

PEOPLE *ex Rel.* NEW AMSTERDAM GAS COMPANY *against* THE STATE BOARD OF TAX COMMISSIONERS. } Assessment of 1900. No. —. Final Order.

A writ of *certiorari* having heretofore been duly allowed in this proceeding pursuant to provisions of article XI. of the tax law, as amended by chapter 712 of the Laws of 1899, upon the verified petition of the relator herein to review the action of the State
358 Board of Tax Commissioners in assessing the special franchises of the relator; proof of due service on the said commissioners of the said writ, together with copies of the petition on which it was granted and of the order directing the said writ to issue having been made and filed; the said State Board of Tax Commissioners having made a return to said writ; an order of reference having been made herein and entered in the office of the clerk of Albany county, on the 18th day of April, 1901, by which it

was referred to Hon. Robert Earl to take and report to this court such evidence upon the several issues of fact raised by the petition, writ and return herein, as might be adduced before him by either of the parties hereto with his findings of fact and conclusions of law, and the said referee pursuant to said order having filed his report in the office of the clerk of Albany county, on the — day of October, 1902, and exceptions having been duly filed thereto, and upon the coming in of said report, this proceeding having been brought on for a hearing and trial and final determination before this court, upon due notice to all appearing herein, upon the evidence and proceedings so reported, together with the exceptions to the findings of fact and conclusions of law of the said referee, and after hearing counsel for the relator and respondents respectively, and no further evidence being adduced by either party and further findings of fact and conclusions of law having been submitted and this court having duly rendered and filed its decision in writing herein and the relator having duly filed exceptions thereto;

Now, upon the said petition, order directing said writ to issue, writ, return, order of reference, report, decision, and all the papers and proceedings heretofore had herein, and upon motion of the attorney-general,

359 It is hereby ordered, adjudged and determined that said assessment is excessive and unequal in that other real property in the city of New York is assessed at 67 per cent. of its full value, whereas the special franchise of the relator is assessed at its full value; that the said assessment of the relator's special franchise as made by the State Board of Tax Commissioners and as entered upon the assessment rolls of the city of New York for the year 1900, at $137,433 in the borough of Queens and $3,989,182 in the borough of Manhattan is excessive and unequal; that the equalized valuation of such special franchise is and is hereby fixed at $293,081 in the borough of Queens and $2,672,711.94 in the borough of Manhattan—to which amount the said assessment is hereby corrected and reduced so as to make it conform to the valuations and assessments of other property upon the same rolls and to secure equality of assessment, and as so reduced said assessment is hereby confirmed; that upon payment by the relator to the receiver of taxes of the city of New York or other proper officer of the amount of tax due upon said equalized and corrected valuation less all sums required by law to be deducted therefrom, the said receiver of taxes or other proper officer shall receive the same in full satisfaction of the tax appearing upon the assessment rolls of said city for the year 1900 against said special franchise and shall wholly discharge and cancel said tax.

Enter.

D. CADY HERRICK, *J. S. C.*

(Endorsed:) Entered in the office of the clerk of the county of Albany, on the — day of —— 1902.

360 (*Notice of Appeal.*)

Supreme Court, Albany County.

PEOPLE *ex Rel.* NEW AMSTERDAM GAS COMPANY *against* THE STATE BOARD OF TAX COMMISSIONERS. } Assessment of 1900. No. 1. Notice of Appeal.

SIRS: Please take notice that The New Amsterdam Gas Company, the relator herein, hereby appeals to the appellate division of the supreme court, for the third department, from the final order in the above entitled proceeding, dated the — day of October, 1902, and entered in the office of the clerk of Albany county on the — day of ——, 1902, and from so much of said order as confirms the assessment of the relator's special franchise at $293,081 in the borough of Queens and $2,672,711 in the borough of Manhattan.

JOHN C. TOMLINSON,
Attorney for Relator, 15 *Wall St., Borough of Manhattan, N. Y. City.*

To John Franey, Esq., county clerk.
To Hon. John C. Davies, attorney-general, attorney for the respondents.

361 *Affidavit of No Opinion.*

Supreme Court, Albany County.

THE PEOPLE *ex Rel.* NEW AMSTERDAM GAS COMPANY *against* THE STATE BOARD OF TAX COMMISSIONERS. } Affidavit of No Opinion. Assessment of 1900, No. 1.

John C. Tomlinson, being duly sworn, deposes and says: That he is of counsel for the relator in the above entitled proceeding; that no opinion was rendered by Mr. Justice Herrick in this proceeding.

JOHN C. TOMLINSON.

Sworn to before me this — day of ——, 1902.

P. H. DELEHANTY,
Notary Public, New York Co.

Cert. filed in New York Co.

362 (*Stipulation and Waiver of Certification.*)

Supreme Court, Appellate Division, Third Department.

THE PEOPLE *ex Rel.* NEW AMSTERDAM Gas Company *against* THE STATE BOARD OF TAX COMMISSIONERS.	Stipulation and Waiver of Certification. Assessment of 1900, No. —.

It is hereby stipulated and agreed, pursuant to section 3301 of the Code of Civil Procedure, that the foregoing are true and correct copies of the order appealed from herein, the notice of appeal and all the papers and evidence upon which the court below acted in making such order on file in the office of the clerk of Albany county, and the certificate of the clerk to that effect is hereby waived.

Dated Albany, —— —, 1902.

JOHN C. TOMLINSON,
Attorney for Relator-Appellant.
JOHN C. DAVIES,
Attorney-General, Attorney for Respondents.

363 *Memorandum of Decision.*

Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERDAM Gas Company, Appellant, *against* GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Composing and Constituting the State Board of Tax Commissioners of the State of New York, Respondents.

Order appealed from affirmed on the facts and reversed on the law, and assessment vacated, upon opinions in People *ex rel.* Metropolitan Street Railway Company *vs.* State Board of Tax Commissioners, decided this term.

Form of order, if not agreed upon, to be settled by Chase, J.

364 *Order of Appellate Division.*

At a term of the appellate division of the supreme court of the State of New York, held in and for the third judicial department, at the court house of the appellate division, in the city of Albany, on the 6th day of January, 1903.

Present: Hon. Charles E. Parker, P. J.; Hon. Walter Lloyd Smith;

Hon. S. Alonzo Kellogg; Hon. Emory A. Chase; Hon. Alden Chester, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* New Amsterdam Gas Company, Relator-Appellant,
against
THE STATE BOARD OF TAX COMMISSIONERS, Respondents.
} Proceedings of 1900.

The above-named relator, New Amsterdam Gas Company, having appealed to the appellate division of the supreme court for the third judicial department from the final order in the above-entitled proceeding entered in the office of the clerk of Albany county on the 15th day of July, 1902, and from so much of said order as confirmed the assessment of the relator's special franchise at $293,081 in the borough of Queens, and $2,672,711 in the borough of Manhattan, and said appeal having been duly argued by counsel for the relator-appellant and by counsel for the State Board of Tax Commissioners, respondents, and all things having been duly considered,

Now, upon motion of John C. Tomlinson, Esq., attorney for the relator, it is

Ordered, adjudged and determined, that the order appealed
365 from, so far as it confirms the assessment upon the relator's special franchise at $293,081 in the borough of Queens and $2,672,711 in the borough of Manhattan, be and the same is hereby affirmed on the facts, and be and the same is hereby reversed on the law; and it is

Further ordered, adjudged and determined, that said assessment upon the relator's special franchise, as confirmed as aforesaid at $293,051 in the borough of Queens and $2,672,711 in the borough of Manhattan, is illegal and void, and the same is hereby directed to be stricken from the assessment roll.

JOSEPH HOLLANDS, *Clerk.*

366 *Opinion of Parker, P. J.*

Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* Metropolitan Street Railway Company, Appellant,
against
THE STATE BOARD OF TAX COMMISSIONERS, Respondent.

Argued November Term, 1902.

Before Parker, P. J.; Smith, Kellogg, Chase, and Chester, associate justices.

The relator herein seeks to review and vacate the assessment made against it by the State Board of Tax Commissioners under the provisions of the so-called special franchise tax act; and the proceedings are taken under the provisions of article II of the tax law, as amended by chapter 712 of the Laws of 1899. A certiorari was issued, and the issues made by the return thereto were duly referred. Upon the coming in of the referee's report the special term approved and adopted the same, and made an order modifying the assessment in some particulars, and, as so modified, sustaining the same. From such order this appeal is taken.

Henry A. Robinson, (Wm. H. Page, Jr., of counsel), for appellant.
John C. Davies, attorney-general, (J. Newton Fiero, of counsel), for respondent.

PARKER, *P. J.*:

The first question presented by this appeal is whether the provisions of the law which authorize the assessment and tax com-
367 plained of are violative of section 2 of article 10 of our State constitution. Such act, being chapter 712 of the Laws of 1899, first amends section 3 of the tax law by adding to the subjects of taxation therein specified the right or franchise to construct, maintain or operate upon, over or under the streets or public places of any town or municipality in the State, the tangible property thereon which was already specified in the section as being real estate and therefore assessable. The value of such tangible property, plus the value of the right to maintain and operate the same, is thereafter to be assessed and taxed together, and is denominated in the act as a "special franchise." No criticism is made that this addition to the taxable property named in the section violated any provision of the constitution; but the act further provides that the assessment of such special franchise shall be made by the State Board of Tax Commissioners. That board is required to fix the valuations of all such special franchises wherever found in the State, and to report such

assessment or valuation to the proper local assessor, and such local officer is required to place such special franchise upon his roll of the taxable property in his district, at the valuation so received, and the tax is thereupon levied and collected against the same in the same manner and for the same purposes as against the other property on such roll.

This provision it is claimed violates the above cited section of the constitution, for the reason that it deprives the local assessors of a portion of their duties as such assessors, and directs the performance of the same duties by officers who are not chosen by the electors or any authorities of such locality.

In the *Raymond* case (37 N. Y., 428), this section, which is familiarly known as the home-rule provision of the constitution, received
368 judicial construction in its application to the subject of assessment for the purposes of taxation.

In that case, the legislature by chapter 410, Laws of 1867, sought to transfer the duties of the commissioners of taxes and assessments for the city of New York, who were officers appointed by local authorities, to a board of five commissioners appointed by the governor, by and with the consent of the senate. At the time of the adoption of the constitution of 1846, such duties of assessment were, and for a long time had been performed by district assessors. By various acts passed in 1850, 1857 and 1859, the legislature had regulated the performance of such duties and changed the officers who were to perform them. But in each instance the selection of such officers was left to local authorities. The act of 1867, however, sought to change the selection of such officers from the city to the State, and it was at once challenged as being violative of the home-rule provision of the constitution. The question came before the court in the case above cited, and it was there distinctly held as follows: That beyond controversy the office in question was *exclusively* a city office. That the duties imposed by the act upon the new board, although broader in their extent, were essentially the same as those exercised by the city assessors in 1846. That the plain intent of the section of the constitution in question "was to preserve to the localities the control of the official functions of which they were then possessed, and this control was carefully preserved (consistent with the power of the legislature to make needful changes) by restricting the power of appointment of other officers to perform the same functions, to the people, or some authority, of the locality." That, hence, the act of 1867 deprived the people of the city of a right *secured* to them by the constitution, and was therefore void.

This case has never been reversed or modified, so far as I can ascertain, and would, I think be conceded by the respond-
369 ents in this case, to be a controlling authority in a case where the conditions were in all respects similar.

But, in what respect does that case differ, in principle, from the one before us? There the act sought to transfer from local assessors to those appointed by the State authorities, the duty of assessing all the property in the city of New York. The decision is that the

legislature was *without authority* to do that thing; that the function of assessing such property was, by the constitution, *secured* to officers selected by the locality. The act before us does not transfer the duty of assessing *all* the property in the various tax districts to the State assessors, but only all of a certain specified kind. Now, if the legislature is without authority to transfer the duty of assessing all, I am at a loss to discover whence it gets the right to interfere with the assessment of any part of such property. The right to have all the property in its locality assessed by officers chosen by itself, was secured to each town and municipality in the State by the constitutional provision in question; and, in my judgment, the legislature has no more power to infringe upon that right by withdrawing from its operation one particular species of property, than it has to withdraw a dozen. It is clear that by the statute before us, the right to assess a distinct kind of property in every district, and in some localities a very considerable portion thereof, is transferred from local to State assessors; and this transfer would seem to be as unwarranted as was the transfer attempted by the statute of 1867, which the *Raymond* case condemned.

It would seem that such decision "absolutely dominates" the case before us, and should control our disposition of the same. And so it does, even in the judgment of the learned jurist whose decision
370 as referee was adopted by the court at special term, and whose opinion is now before us, were it not that he sees a distinction in the fact that the amount of property transferred from local to State assessment is, in every instance, very small as compared with the whole amount of property taxed, and in some localities does not amount to anything. All of the principles decided in the *Raymond* case he seems to adopt, but he sustains the act before us upon the theory that it does not substantially interfere with the home-rule principle, which it is the purpose of this section of the constitution to protect. The argument is, that it does not take away from the local assessors enough of their functions to operate as a substantial invasion of the right of home rule in any locality, and that therefore it is not a violation of the provisions of that section. As illustrating and sustaining this claim, he cites many cases in which acts of the legislature have been sustained that, to some extent, transferred from local to State officers certain duties which the local officers might, within the line of their duties, have performed. But in no one of them do I find that the act was sustained upon the ground upon which the referee would sustain this act.

In the *Draper* case (15 N. Y., 532), which is one of the earliest cases to adjudicate upon this section, the validity of a law was in question, which created a new metropolitan police district from the city of New York and three adjacent counties, and which provided for the appointment by State officers of the commissioners therein and abolished the existing police departments of the several municipalities within such district. That case sustained the act, on the ground that the State had authority to create new civil divisions for police purposes and to administer through its own officers

the duties and regulations prescribed for the same. It distinctly held that had the act applied to the city of New York
371 alone, it could *not* have been sustained; but it denied that the constitution assumed that the subject of police was localized in the several cities and counties of the State. It held that, "as a political society the State has an interest in the repression of disorder and the maintenance of peace and security in every locality within its limits; and if from exceptional causes the public good requires that legislation, either permanent or temporary, be directed toward any particular locality, whether consisting of one county or of several counties, it is within the discretion of the legislature to apply such legislation as in its judgment the exigency of the case may require; and it is the sole judge of the existence of such causes." Hence it treated the authority of the State upon the subject of police as paramount over that of the localities; and substantially held that, for such reason, no exclusively local function had been interfered with. As to such functions, there was in fact no right of home rule to be preserved to the localities. And this is the principle which pervades and controls all the cases relied upon by the court below. In the *Capital Police* case (36 N. Y., 285) the act was held good upon the same principle; while in the *Albertson* case (55 N. Y., 50) the act was condemned because it was held to apply to the city of Troy only. So in the case *Rathbone v. Worth* (150 N. Y., 459), the act concededly dealt with the subject of police for the city of Albany merely, and a very slight interference with its power of local appointment was condemned.

Upon the same principle, statutes concerning excise (31 N. Y., 657) and the preservation of the public health (37 N. Y., 661) were sustained. So those authorizing the construction of public parks, avenues, and even a court house, by commissioners named by the State, have also been sustained, even though such construc-
372 tion was within the scope of the functions of local officers. *Astor* case (62 N. Y., 567); *McDonald* case (69 N. Y., 362); *Cheritree* case (6 T. & C., 473); *Harlon* case (57 Barb., 383). But the foundation of each decision has been, that the State had a paramount right to direct the work to be done, and hence could do it through its own instrumentalities. This is especially made clear by the reasoning of the opinion in the *Oneida Courthouse* case (170 N. Y., at page 108).

My analysis of these cases is made only for the purpose of ascertaining how far they sustain the principle upon which the court below has decided this case. Whatever criticism has been, or may be, made of any of them is quite unimportant to this case, so long as it is apparent that in neither is the decision placed upon the ground that the infringement complained of was not sufficient to substantially imperil the principle of home rule. In many of them the functions of the local officer were entirely transferred, and in each of them the controlling principle has been that the act of the legislature did not invade any right or function that was *exclusively* local in its character. In each instance it was held that the State

had the paramount right to control the subject affected by the act, and hence that there was no invasion of local functions. As is said in the very excellent and scholarly brief submitted by the appellant's counsel on this question, it has been the *nature* of the power sought to be conferred upon the State officers that has controlled the decisions of the court.

Whenever the courts were of the opinion that the act did not interfere with any functions that were *exclusively* local, then the act was sustained, even though it *wholly* abolished the local office and transferred its functions to a State or department officer.
373 But whenever the functions affected by the act were exclusively local, whenever they *did not* come within the category of those over which it has always been recognized that the State, for the benefit of the State at large, has the paramount control, then any transfer whatever of such local functions has *not* been permitted. And therein lies the clear distinction between the *Raymond* case and those above cited. It is practically conceded by the referee that the subject of assessment of local property for local taxation is not a subject over which the State has paramount authority. As stated by him, "the assessment of property for the purposes of taxation has always in this State been a function of local officers elected or appointed in the locality where they discharged their duties, and this system of assessment is entrenched in the constitution to secure to the people the home rule to which they had always been accustomed, and of which the people of our race have always been tenacious." Therefore, as against the position taken by the court below no argument is needed to establish that proposition.

A broader and bolder position, however, was taken upon the argument of this appeal. It was there said that no authority can be found for the claim that the assessment of property for local taxation is a function exclusively appertaining to local officers, and that the State has the same power to take from a local officer his duties and transfer them to a State officer as it had to take from the police commissioners of the city of New York their duties and transfer them to officers of a department of the State. In short, that its power over the subject of assessment is as paramount as is its power over all the several subjects referred to in the cases above cited, and that while the constitution prohibits the State from filling a local office which at the time of its adoption was filled by election or appoint-
374 ment by local authorities, yet it does not prohibit it from abolishing such local office and transferring the duties of that office to an officer of the State at large; that it may take to *itself* the performance of any, or all, the functions of the local office, but it may not name the local officer to perform them; and so far as the question now before us is concerned, this is upon the theory that the State possesses the absolute power to tax, and hence it may take to itself the assessing of property, which is but an incident to the power of taxation. Evidently this theory utterly annihilates the constitutional protection to the principle of home rule for local municipalities, and leaves very little importance or effect to the section in ques-

tion. It is at variance with many decisions of the courts construing this section and is approved by none. In the recent decision in this court of the *Brenner* case (67 App. Div., 381) it was said, "It must be regarded as well settled that the purpose of the constitutional provision in question is to secure to localities the fundamental right of self-government; that it protects all official duties existing at the time of its adoption vested in local officers, and inhibits the *transference* of such duties to officers not elected by the electors of the locality or appointed by local authorities; that it is not the officer but the office, the existing duties and functions, to which the protection is extended and which cannot be *transferred to an officer elected or appointed other than in the prescribed manner*." And this case was affirmed in the court of appeals. (170 N. Y., 185.)

Moreover, the *Raymond* case above cited is a direct authority against such view. As shown above, it declares that the plain purpose of the section was to preserve to localities the *control* of the official functions of which they were possessed at the time it was passed, and that "any other construction would render the
375 section in question, when applied to the cities of the State, substantially nugatory." Undoubtedly at that time assessors of the localities were the *only* ones whose duty it was to assess property for local taxation. If the power to make such assessments may be now transferred to a State officer the *control* of the localities over that subject is as much taken away as if it were transferred to a local officer named by the State; and thus the purpose of that section is evaded. Clearly the *Raymond* case proceeds upon the theory that the duty of assessing local property for the purpose of local taxation was exclusively a function of the local assessors; and hence is authority for the claim that such duties may not be transferred by the legislature to *any* officer whatever who is not chosen by the localities themselves.

We are left, then, with the single question whether the views of the court below can be sustained upon principle only.

Its argument is, that the amount of property, the assessment of which is transferred from local to State assessors by this act, is so inconsiderable a portion of the whole that, as a matter of fact, neither of the localities is "in any '*material*' manner deprived of local self-government." That therefore their home-rule rights are not "substantially" invaded, and hence it does not at all infringe against the constitutional prohibition.

But the question is not whether such transfer affects their home-rule rights or their local self-government "materially" or "substantially," or, as I understand the argument, to an extent sufficient to do them any harm; but whether it does, or does not, amount to a direct and actual invasion of such rights. Beyond controversy, this act takes away from the local assessors the function of assessing a certain kind of property, and transfers it to the State Board
376 of Tax Commissioners, and to this extent makes such board perform the functions of a local officer; and, if we sustain this act, we must sustain their authority to do that very thing. But

this is the very thing that the constitution says they may not do. Officers appointed by State authority may not be authorized to perform the functions of an office exclusively local. Clearly, the invasion which we would thus sustain, if repeated, would ultimately transfer the whole function of assessment from local to State officers; and so it would seem that the first invasion is as much a violation of the constitutional prohibition, as would be the one that transferred the last remnant of property remaining to the local assessor.

I cannot agree that the principle of home rule is not *endangered* because the *courts* may tell the legislature that it has *intruded* upon it far enough. Such is not the constitutional scheme for its protection. That instrument declares what the legislature may not do. They may not transfer the functions of a local office to State officers. If an act of the legislature attempts to do that, presumptively it is a dangerous invasion of the home rule principle—certainly it is a prohibited one. It is a question of authority on the part of the legislature. Concededly, it would not be authorized to so transfer, by other acts, many other specified kinds of property. Concededly, the time would come when, to save to localities their home-rule rights, the courts must hold an act to be unconstitutional, that in itself attempts to do no more than this act does. In my judgment, both acts would be equally unauthorized.

It is suggested that so much of the "special franchise" as consists of the mere right to operate the tangible property in streets and public places has never heretofore been the subject of taxation, and that as to such new property the act in question, by depriving the local officers of the right to assess it, takes no right from them that they ever had before, and hence the principle of home rule is not invaded.

377 But it has been the duty of local assessors, ever since the office existed, to assess all property in their district that was liable to taxation, and they were the sole and only officers upon whom such duty was imposed. The legislature from time to time, as new species of property have come into existence, has imposed the burden of taxation upon them; yet it did not need an act of the legislature to enable the assessors to assess such new property. That duty devolved upon them as soon as the property was declared taxable, by virtue of the long existing and well-recognized function of their office, and it is this very duty of assessing *all* the property in a locality upon which the legislature shall impose the obligation of paying a local tax, that the localities insist should be exercised by officers chosen by themselves. The functions of the office are neither enlarged by an addition of property to the tax list, nor are they diminished by a removal of property from that list. Undoubtedly the legislature has the power to do either, but the functions of the assessors' office remain the same. The right and the duty of the assessors to assess whatever property in their district the legislature shall declare taxable for local purposes is the long-existing and assured function of that office which is sought to be preserved. Therefore, when the legislature deemed it wise to add to the taxable list

the so-called "special franchise," the duty of assessing it devolved at once upon the local assessors. Its creation at once brought it within the scope of their official duties. By virtue of the functions of such office it became the duty of the assessors to assess it. It is true that the assessors have never heretofore had the opportunity of assessing such property. It has never been made taxable and so brought within the scope of their duties, but their right and duty to assess, now that it has been made taxable, has always existed, and by appointing another officer to perform that duty the act in
378 question directly invades the functions of such office and attacks the principle of home rule.

Moreover, a considerable portion of the "special franchise" consists of tangible property that has long been assessed by the local officers. In the city of New York alone it amounts to something over seventy-six million dollars. All such property the law in question withdraws from the assessment by local assessors. It is argued that such property is a mere adjunct to the "franchise or right to use it," and that as the duty of assessing such right may be taken away, the duty of assessing its adjuncts must go with it. As said above, this is a question of power in the legislature, and I am unable to understand how that body gets the power to withdraw the tangible property from local assessment by merely requiring it to be assessed with the intangible right to use it. It cannot do indirectly what it may not do directly. It has no more power to add it to intangible property, and so withdraw it from local assessment than it has the power to withdraw it directly from such assessment.

I am forced to the conclusion that so much of the act in question as provides for the assessment of a special franchise by the State Board of Tax Commissioners is unconstitutional and void.

I am not unmindful of the importance of this question. The great interest which the taxpayers of the State take in this effort to subject to the burden of taxation a very large amount of property, which undoubtedly is of immense value to its owners, and the disappointment which will naturally accrue through its failure to them and to those legislators who evidently adopted this plan as the one best calculated to protect alike the owner and the public, is fully appreciated by me. But this court does not enter as a pioneer
379 upon the consideration of this question. Every principle involved in it has been settled by the court of appeals, and we may do no more than recognize and enforce such principles in their application to this case. As stated above, in my judgment the decision in the *Raymond* case absolutely dominates this case.

Opinion of Kellogg, J.

KELLOGG, *J.*:

The question of the constitutionality of the so-called "special franchise" amendment of the general tax law is approached with no little hesitancy, owing to its importance; also to the fact that it

has been discussed and determined by an able jurist, the learned referee appointed herein, and the further fact that the question is avowedly on its way to the court of appeals, where alone the question can be finally answered. Counsel on both sides have very ably and with evident conviction argued this question before us and insist upon the deliberate judgment of this court unbiased by what has gone before or what may come after, and we are therefore called upon to express our independent convictions and briefly state the grounds upon which they are based.

The learned referee has held that assessing property for the purpose of taxation under the general tax laws of the State is a local function and can be exercised only by local assessors elected by the electors of the locality or appointed by the local authorities. He says:

"The assessment of property for the purpose of taxation has always in this State been a function of local officers elected or appointed in the locality where they discharged their duties,
380 and this system of assessment is entrenched in the constitution to secure to the people the home rule to which they had always been accustomed and of which the people of our race have always been tenacious."

This must mean that the legislature has not the power to take from the local assessors this function and settle it upon an individual or body appointed by the legislature. It is not a function which the legislature has power to change from a local to a State function. This conclusion of the learned referee is supported by the court of appeals in *People v. Raymond* (37 N. Y., 428) and by every case in that court in which the question of assessment of property for purposes of general taxation has directly or indirectly arisen. The organization tax and franchise tax levied by the comptroller upon corporations are held not to be taxes, but charges by the State upon the right to do business in a corporate capacity, a privilege the State may give or take away. So with the inheritance tax; it is held not to be a tax upon property, but a charge upon the succession, also a right the State may give or take away. (*Matter of estate of Swift*, 137 N. Y., 77.) It has never been claimed that valuations made by the comptroller or by his appointees or by any appointee of the State in such cases, for the purpose of fixing the sum to be charged for the enjoyment of these State privileges, was a local function. The State has seen fit to base its claim against certain corporations upon a valuation of capital employed in the State. It might have demanded a share of its earnings instead, and it might, without valuation, have taken a share in kind of the property of a deceased person as the price of transmission of the remainder to the heir, devisee or legatee. I do not therefore see how much incidental valuations for special purposes have any bearing upon the question before us.

381 Speaking generally of the home rule which the constitution essays to protect, the courts in many instances have undertaken to define, distinguish and point out what is *not* a local func-

tion as contemplated by the constitution; but as to the matter of assessment of property for general taxation they have uniformly held that to be a local function. The class of cases in which the courts have held the function to be exercised not to be exclusively local are such as relate to the exercise of police powers, and as instances of these are *People v. Draper* (15 N. Y., 532), *People v. Pinckney* (32 N. Y., 377), *Board of Health v. Heister* (37 N. Y., 661), *Board of Excise v. Barrie* (34 N. Y., 657), *Astor v. The Mayor* (62 N. Y., 567), *People ex rel. Kelmer v. McDonald* (69 N. Y., 362), *People ex rel. v. Cheritree* (6 T. & C., 473), *Hanlon v. The Supervisors of Westchester* (57 Barb., 383), *City of Syracuse v. Hubbard* (64 App. Div., 587), *The People ex rel. v. The Board of Supervisors of Oneida Co.* (170 N. Y., 105).

In these cases the court in every instance professed to see that the principle of home rule contemplated by the constitution was not involved for the reason that the function sought to be exercised was not local in such a sense as to deprive the State from its unlimited exercise. In some cases it is true that the prevailing opinion of the court conveys the impression that local self-government as a principle, so far as recognized by the constitution, is a sort of nebula with limitations as uncertain, unstable and elusive as the tail of a comet (*Matter of Allison, com. of jurors*, 172 N. Y., 421), but all, nevertheless, declare that the constitution does recognize the principle and protects it against legislative encroachment.

It will be of little worth to here state the process of court reasoning by which conclusions were in those cases arrived at. We are only concerned with the uniform finding of the court in each
382 case that the function sought to be exercised by the State was not a local function and the home rule principle embedded in the constitution was in no manner or degree invaded. None of these cases excuses the conclusion arrived at on the ground that the invasion of the field protected by the constitution was slight or not substantial. None of them claims that there is a difference between a small invasion and a great one in determining whether an act of the legislature is constitutional or otherwise. If the theory of "substantial invasion" is the proper theory in determining whether or not there has been an unlawful violation of the constitution, the courts might well have held in the *Brenner* case (*Matter of Brenner*, 170 N. Y., 185) that the act considered was constitutional because there was left to the home rule the power of appointment and election of so many other officers that the taking away of a single office was not a substantial infringement.

It seems to me that the question of the constitutionality of the act we are considering hinges wholly upon the question as to whether or not the assessment of property for general taxation is an exclusively local function. If it is conceded to be, or is determined to be an exclusively local function and, as said by the referee, is a "system of assessment entrenched in the constitution to secure to the people the home rule to which they have always been accustomed and of which the people of our race have always been tenacious," then it

must be the duty of the courts, until the people shall change the organic law, to see that these secured rights are not unlawfully invaded. It matters not, it seems to me, how little or how great may be the invasion proposed. Every little violation of the constitution is as inexcusable as is a larger violation. Considerations of convenience or better service have no place in the discussion or
383 in the determination of this question. If we were authorized to hew away the constitution every time it binds and so make it run in accord with the legislative idea of public needs we might then take into account the good and the bad which might result from the change.

The learned referee has found that the tangible property heretofore assessed by local assessors throughout the State amounts to $76,585,225. The assessment of this is, by the legislative amendment to the general tax law, taken from the local assessors and the function transferred to a State board. No one can deny that this is a palpable violation of the constitution, at least in some degree. It may not be a very large invasion but it is a material invasion, for I assume that every invasion, if plainly an encroachment, however small it may be, is material to those who give heed to a constitutional inhibition. The excuse for transferring this power to assess the tangible property on, under and over the public streets and places, is based upon the claim that this property is inseverable from the franchise, the intangible property. That it is not inseverable for the purpose of valuation is plain. That is manifest from the findings of the referee who has ascertained from the testimony of the State board of assessors the value of the tangible and intangible separately. It is also plain from the approved method of assessment adopted by the State board, viz., appr-ising first the whole property of the corporation and deducting therefrom the value of all the tangible property of every name and kind owned by the corporation, estimated on the cost of reproduction, and taking the result as the net valuation of the intangible, or franchise. It is not inseverable either for the purposes of enforcing payment of the tax.

The franchise may be sold without the tangible property on,
384 under or over the streets. Its value without the tangible would be the value of both less the cost of reproduction of the tangible; so the State board of assessors have determined, and both are separately valuable. The tracks of a street railway are no more essential to a profitable use of the franchise than are the power houses which furnish the power and which are not assessed with the intangible property; both the tracks and the power houses as well as the rolling stock may be replaced. The case cited (*People v. O'Brien*, 111 N. Y., 47) to show that "the franchises would be of no value without tangible property to operate them and so they are inseparable" was based upon *Gue v. Tide Water Canal Co.* (24 How. U. S., 257). That was a case where the sale of a canal by piecemeal was sought to be enjoined in equity. A levy had been made on the locks of the canal, the toll house and land surrounding the outlet locks, all essential to the uses of the canal. The court held

that to sell a canal lock would destroy all value in the canal itself and would be of no value to the purchaser, hence the sale was enjoined. It is obvious that a canal so far differs from a street railway as to make the case cited wholly inapplicable. The tracks of a railway may be removed, but the lock of the canal could not be. There could be no replacement of the property sought to be sold appertaining to the canal, hence a sale would destroy the franchise. This cannot be the case as to any of the property contemplated to be assessed by the amendment of the tax law under the name of special franchise.

The assessment by a State board of the franchises themselves—the intangible property of a corporation as defined by the amended act—presents perhaps another question. This property is not new property coming to the locality but has always existed there
385 though it has never been locally assessed. To assess this property judiciously or by the method adopted by the State board the local assessors in most cases would need to go beyond their precincts. The property can hardly be said to be localized. For instance a street surface railway, a telegraph, telephone or pipe line, which runs through several incorporated villages and on the highways of intervening towns, must possess a franchise from each municipality. The value of these franchises separately considered might be very little but the value combined might be very great. The right to run cars on the highways of a town could only be valuable as connected with the right to run through the other municipalities. These franchises therefore are only links in a chain. The chain may have great value but the links have no value except for their being component parts of the chain itself. It is obvious that to give a proper value to any link the value of the entire chain must be first ascertained and then an approximate apportionment would not be difficult. But the value of the chain largely depends upon the earning capacity for the time being of the entire property of the corporation used to do the business which the franchises permit to be done, and the value of the chain of franchises, ascertained in the mode adopted by the board of assessors—and no better mode has been suggested—requires a valuation of the entire corporate assets and a separate valuation of all the tangible property in each municipality and elsewhere situated, and then by a process of elimination the value of all the franchises together may be determined. It is possible that this might be done by local assessors, but in doing it they would be exercising something more than the usual local function of their offices. The appraisement by local assessors of property in another municipality would, if permissable, be a function never before exercised. They could not be protected in so doing by any principle of home rule. And if this is what would be required of them I do not see how their local functions could be disturbed
386 or diminished by the appointment of a State board to make this assessment. The property to be assessed is not in its nature localized in any one taxing precinct. It is not property over which the local assessor has ever exercised jurisdiction. In some

cities and in some other municipalities it may be that the entire corporate property including its franchises are located within the municipal limits, but such cases make the exceptions rather than the rule.

I advise a reversal, and that the assessment be set aside, on the ground that the amendment to the general tax law creating a State board of assessors and giving them power to assess the tangible property on, under and over streets and public places is an invasion of the functions of local assessors and in this respect is a violation of the constitution.

Opinion of Smith, J., Dissenting.

SMITH, *J.*, dissenting:

The legislative act, the constitutional warrant for which is here challenged, was passed in May, 1899. By its provisions a new species of property was added to the property theretofore taxable by law. This new species of property was the franchise, right or permission granted by municipalities to use the public highways and public places within the State. This franchise, right or permission was defined by the statute to include the tangible property of the person, copartnership, association or corporation, the owner of the franchise itself, which was used upon the public way. It was provided that this tangible property should be taxed as a part of the special franchise; that the special franchise as thus defined should be
387 assessed by the State Board of Tax Commissioners, and their assessment as certified should be entered by the assessors or other officers of the various localities in which said franchises existed in the proper column of the assessment roll. One of the grounds of the relator's challenge is that this act violates the home rule provision of the State constitution as found in section 2 of article 10 of the constitution of 1894. That provision of the constitution reads as follows: " * * * All city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed, as the legislature may direct."

The contention of the relator is that this constitutional provision is violated by giving to the State Board of Tax Commissioners the assessment, first, of the franchise, and second, of the tangible property in the street; which, by the act, is made a part of the special franchise subject to assessment by the State officers.

That the legislature might properly give to the State board the assessment of the franchise seems to me of undoubted right. The constitution provides that "all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed, as

the legislature may direct." This provision is a clear index of the constitutional purpose to protect the localities in the home rule which existed at the time of the adoption of the constitution,
388 and to that extent only. All offices thereafter created are to be filled as the legislature may direct. By this act, the legislature has in effect created a new office—a franchise tax assessor; and to the extent of the assessment of the franchise, with duties not existing at the time of the adoption of the constitution. These duties, too, are distinct from and independent of any then existing duties of local officers. An intangible franchise has never been the subject of assessment by local assessors. This is held by the referee below. See *People v. Barker*, 152 N. Y., 417; *People v. Com'r of Taxes*, 104 N. Y., 240. Most franchises are enjoyed in connection with franchises from adjoining municipalities which have a value in their union, the value of which separately, however, is uncertain and practically undeterminable except by arbitrary apportionment. To assess these franchises, access must be had to the books of the corporation and to other data which it would be difficult if not impracticable to give to the assessors of every tax district in which the franchise existed. The duty, therefore, of assessing these intangible franchises, is, as I say, distinct from the duty of assessment of real and personal property. The fact that this franchise is, by the statute termed real estate, and that the local assessors were, at the time, empowered to assess all real and personal property within their tax district, does not affect the situation. Whether it be called real estate, personal property, or neither, is a mere matter of form. The intent of the legislature is plain to make taxable another species of property which had not theretofore been taxable, and to appoint State officers to assess the valuation of the same. But it is immaterial whether a new office has been created or new functions have been added to an old office. In either case existing home rule is not invaded by the assignment of such functions to legislative ap-
389 pointees. There is preserved to the locality every function possessed by it at the time of the adoption of the constitution. *People v. Pinckney*, 32 N. Y., 382; *City of Syracuse v. Hubbard*, 64 App. Div., 589. In my judgment, therefore, the right seems clear, both within the letter and within the spirit of the constitution to give to the State board of assessors the power to assess the intangible franchise. See *People v. Draper*, 15 N. Y., 532; *People v. Wells*, 172 N. Y., 421.

By this statute, however, the tangible property of the corporation within the street, used in connection with the intangible franchise, is made a part of the special franchise which the State officers are empowered to assess. The constitutionality of this provision presents a more serious question. This tangible property amounts to upwards of ninety millions of dollars within the State. It has heretofore since its creation been assessed by the local assessors. It was so assessed at the time of the adoption of the constitution. By this act, this local function, existing at the time of the adoption of the consti-

tution, has been taken away from the local officers and given to the State board. By what rule of construction can this be justified?

Chapter 564 of the Laws of 1865, conferred upon commissioners of Central park, appointed by the central power, the exclusive care, management and control of portions of Sixth avenue and certain other streets in the city of New York for the purpose of regulating, grading, and otherwise improving the same. In *Astor v. The Mayor*, 62 N. Y., 567, that act was questioned as violating the home rule provision of the constitution, by transferring to officers appointed by the central power, functions theretofore always discharged by local officers elected or appointed in the locality. This act was held constitutional and the rule as stated in the headnote is as follows: "The
constitutional provision does not prohibit the legislature from
390 clothing officers appointed by it for the carrying out of a public improvement with power to perform acts which have an especial relation to and connection with such improvement, simply because the power to perform such acts was, at the time, of the adoption of the constitution, vested in local officers elected by the people." In discussing that act, Justice Miller, writing for the court, says: "It would be carrying the doctrine of non-interference with local officers far beyond any reported case to hold that in no case whatever could any of the powers existing in a local officer at the time of the adoption of the constitution be taken away without violating the provision cited." In *People v. Draper*, 15 N. Y., p. 543, Denio, J., in writing of this provision of the constitution says: "If we were to establish the principle that the legislature can never reduce the administrative authority of counties, cities and towns; can never resume in favor of the central power any portion of the jurisdiction of those local divisions, or change the partition of it among them, as it existed when the constitution was adopted, we should, I think, make an impracticable government."

The intimate relation of the tangible property in the street to the intangible property to which it is an incident is seen at a glance. For many purposes they are legally inseparable. In *People v. O'Brien*, 111 N. Y., 471, the court in its opinion, says: "In the former class has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise so as to destroy or impair the value of such franchise. *Gue v. Tide Water Canal Co.*, 24 How. U. S., 257. And by parity of reasoning, it must follow that the tracks of a railroad company and the franchise of maintaining and operating its road in a public street are equally inseparable in the absence of express legislative authority providing for the same." In *Syracuse Water Co. v. City of Syracuse*, 116 N. Y.,
182, the opinion reads: "The corporate rights and the cor-
391 poreal means of their exercise therefore constitutes, as it were, a single body, consisting of property corporeal and incorporeal. Both the power and the means of exercising it are essentially united and upon such union is dependent the enjoyment as well as the practical value of the franchise." Citing *People v. O'Brien*

and *Gue v. Tide Water Canal Co.* In the case of *Gue v. Tide Water Canal Co.*, upon which both of these opinions rest, a creditor of a canal company had levied an execution upon a house and lot, some locks in the canal, and some adjoining building lots, all the property of the canal company and necessary for the conduct of its business. It was there held, that because a sale of the tangible property without the franchise would result in a sacrifice of the property, equity would enjoin the sale in behalf of creditors and stockholders of the corporation and leave the creditor to an equitable action for a sale of the whole property, including the franchise, upon which the proceeds could be equitably distributed. This case, and the authorities based thereon, are distinguished by Justice Kellogg in his opinion, in which he says: "It is obvious that a canal so far differs from a street railway as to make the case cited wholly inapplicable. The tracks of a railway may be removed but the lock of a canal could not be; there could be no replacement of the property sought to be sold appertaining to the canal, hence a sale would destroy the franchise. This cannot be the case as to any of the property contemplated by the amendment of the tax law under the name of special franchise." This distinction of Justice Kellogg is clearly overborne by the authorities. The principal of the case of *Gue v. Tide Water Canal Company* has been applied by the courts with equal force to the tracks and equipment of a railroad which cannot be sold separately from the franchise itself. See *Hammock*
392 *v. Loan and Trust Co.*, 105 U. S. 77; *Buncombe County Commissioners v. Tommey*, 115 U. S., 122; *Kittell v. Augusta T. & G. R. Co.*, 65 Fed. Rep., 861. In that case the opinion in part reads: "It further appears that said sale covers all the construction plant, tools and construction material belonging to said corporation. In such circumstances, a creditor cannot dissever from the franchise property essential to its useful existence." *In National Foundry and Pipe Works v. Oconto Water Co.*, 52 Fed. Rep., 43, where a specific lien was given to a material man upon a plant and franchise of a water company, it was held that they "cannot be separated by judicial sale because of their public use." The judge, in writing the opinion, says: "The structure here is of the class of which canals, street railways, railroads, telegraph, telephone, electric light and gas plants are examples, *and can only be dealt with as an entirety.*"

But it is urged that the tangible and intangible are not inseparable for the purpose of assessment. Possibly they are not absolutely inseparable.

As shown by the evidence the value of the intangible franchise must be determined by taking the value of the whole property, tangible and intangible, and deducting therefrom the value of the tangible. Thus the determination of the value of the tangible property is a prerequisite to the valuation of the intangible. Their values and use depend upon each other. Those values thus interdependent are given to the State board to determine. They are therefore reasonably connected for the purpose of assessment and taxation. And

this is all that is necessary to authorize the legislature to attach the tangible to the intangible property for this purpose.

In the *Astor* case, above cited, the several avenues, jurisdiction of which was taken from the local assessors and given to the State officers, were outside of Central park, and not within the
393 juris liction of the park commissioners. These avenues might have been left to the local officers to improve. There was no absolute necessity that they be transferred to the park commissioners who were appointed by the central power. Nevertheless, by reason of their intimate relation and connection with the park and with the scheme of park improvement, the legislature was held authorized to take from the local officers functions which had theretofore been local functions, and transfer them to these State officers. If, as part of the park improvement, the legislature had thought best to give to the park commissioners the permanent control of the streets surrounding the park, I apprehend that the right to do so would be recognized by the courts as one reasonably connected with and incidental to the scheme of park improvement which the legislature was authorized to adopt and execute.

Nor do I find any authorities which conflict with the conclusion reached. The learned presiding justice deems this case controlled by the case of *People v. Raymond*, in 37 N. Y., 428. That case simply holds that the legislature has no right to abolish the office of commissioner of taxes and assessment of the city and county of New York, and to transfer the duties of that office to one appointed by State authority. It does not hold that his every function is inviolate, and that no part of his duties may be transferred to State officers if such be reasonably necessary as incidental to some plan which the legislature lawfully seeks to accomplish. The office of commissioner of highways cannot be abolished and his duties transferred to an officer appointed by the State. That office, equally with the office of commissioner of taxes of the city of New York, is one within the protection of the constitution. Nevertheless, it has been frequently held that some of the functions of the office of
394 commissioner of highways may be taken from it and exercised by the State; and in the *Astor* case, an act taking from him certain functions was justified because they were incidental to the State plan of park improvement in the city of New York.

In the referee's opinion are cited many instances where certain functions are taken from local officers while the offices themselves are concededly protected under the constitution from destruction by the legislature.

The learned referee, before whom this case was originally tried, has admonished us of certain rules of construction by which we must be guided in the determination of this question. He says in his opinion: "There is also a rule many times announced by the judges that the legislative will is not to be thwarted as in conflict with the constitution unless such conflict is clear and undoubted; and that whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and give it the

force of law, such construction should be adopted. The legislature has supreme legislative power except as such power is limited in the Federal or State constitutions; and we must be able to point to some unmistakable constitutional limitation before such power can be curtailed. A further rule must, however, be observed, that a thing within the intent of the constitution, if that intent can be gathered from the instrument itself considered in all its parts or from the history connected with it of which a court can take notice, is, for all purposes, to be regarded as within its words and terms, and that the plain purpose of the constitution will not be thwarted by a too close adherence to its letter."

Guided by these rules of construction, we must not lose sight of the fact that what is protected by the constitution is the local
395 office and not each separate function thereof. It may be that the legislature would not have power arbitrarily to take from a local officer some of his regular functions, however small. The argument is not without force that a slight arbitrary invasion might be followed by another until the substance of the office is gradually taken from the locality. Where, however, the functions of a local officer are left substantially unimpaired, to take from him certain of his functions and give them to State officers entrusted with the execution of a lawful State purpose, where the transfer is of *functions reasonably incidental to the fulfillment of that purpose*, in no way offends as against the constitutional prohibition. To hold otherwise and to rule that no single function may ever be invaded would materially cripple the power of the State in the institution of public improvements, and would, in my judgment, be a limitation never intended by the framers of the constitution. The legislature has transferred to State authorities the capital execution of criminals. Those functions have been taken from local constitutional officers and given to State officers. To question the constitutional right to accomplish this purpose would be generally recognized as quibbling over the constitutional restriction. The constitution should receive such liberal construction as will protect the people in the rights intended to be reserved, and at the same time render possible the growth and prosperity of the State. The limitation which the majority of the court have here found is at the most an implied limitation, unwarranted, as I think, either by authority or by any reasonable conception of the intent of the framers of the constitution. I am impressed with the conviction that to hold this law invalid is to pervert the will of the people of the State, as written in their fundamental law.

396 *Opinion of Chester, J., Dissenting.*

CHESTER, *J.*, dissenting:

The special franchise tax law (so called) chapter 712, Laws 1899, amended the tax law (chapter 908, Laws 1896) so that the terms "land," "real estate" and "real property," as used in the tax law,

should include not only all surface, underground or elevated railroads, but "the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways, or public places;" and also the "value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon or through any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes." The amendment further provided that, "a franchise right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place, or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise." It was also provided in the amendatory act that, "the State Board of Tax Commissioners shall annually fix and determine the valuation of each special franchise subject to assessment in each city, town, village or tax district." The amendment also required the board to return its valuation to the local authorities to be included in the local assessment rolls, and required the local authorities to enter the valuation of the special franchises, so fixed by the State board, in the proper place in the local assessment rolls.

397 The act did not interfere with the office of assessors or other local officers charged with the duty of making assessments. The only power taken from such local officers was the power to assess the tangible property in the streets which was defined by the law to be, and to be taxed as, a part of the special franchise.

The most important question in the case is whether the legislature had the power under the constitution of the State to take this function from the local assessors. That the legislature had the power to commit to the State Board of Tax Commissioners the function of assessing the intangible property constituting a part of the special franchises is not, I think, open to serious question. Such intangible property was made taxable for the first time in this State by the amendment and the legislature had the undoubted right to commit its valuation for the purposes of taxation to any agency it might choose without the impairment of any functions of local officers, because no local officer ever had any power or authority over property of that character for the purposes of taxation.

As to whether or not the legislature could commit to the State Board of Tax Commissioners the power to value the tangible property in the streets forming a part of these special franchises is a more serious matter. My examination of this question has led me to a different conclusion from that reached by some of my associates and I will, as briefly as I may, state the reasons for my conclusion.

The home rule provisions of the State constitution which is

brought in question here is found in section 2 of article X, and is as follows:

"All county officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. All city,
398 town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct."

The office of assessor is not mentioned in this section, nor are the functions of any local officer defined therein. While this section expressly secures to the localities the selection of their local officers it does not in express terms protect the functions of such officers from legislative or State interference. But the appellant's counsel insist, and no doubt rightly, that we may read into the constitution by implication from the history of the State at or prior to the time of the adoption of the constitution that the assessment of property for the purpose of taxation is a local function. So far I may agree with them and find ample authority in the decisions of the courts for so doing. But when they insist that under the implied provisions of the constitution such assessment is *exclusively* a local function in the sense that the State cannot interfere with it or confer upon officers appointed by State authority the function of valuing tangible property in the streets constituting part of a special franchise, notwithstanding such property has heretofore been assessed by local assessors, I find myself unable to yield my assent.

While an act of the legislature must stand the test as to whether its provisions are counter to the clearly implied, as well as to the express, provisions of the constitution, yet I cannot conceive it to be the duty of the court to aid in reading into the fundamental
399 law matters of doubtful or uncertain implication in order thereby to effect the condemnation of an otherwise valid act.

In considering this question some elementary principles may first be alluded to. The legislative power is absolute and unlimited, except as restrained by the State or Federal Constitution. (*Bank of Chenango v. Brown*, 26 N. Y., 467; *People v. Flagg*, 46 N. Y., 401; *Lawton v. Steele*, 119 N. Y., 232; *Railroad Co. v. County of Otoe*, 16 Wall. U. S., 667.) The power to tax is inherent in government and is a legislative power limited only by constitutional provisions. (*Town of Guilford v. Supervisors of Chenango Co.*, 13 N. Y., 143; *Clark v. City of Rochester*, 24 Barb., 446.) The security for the abuse of this power is to be found in the responsibility of the members of the legislature to their constituents and not in the courts. (*People v. Mayor of Brooklyn*, 4 N. Y., 426.) Cities, counties and towns are but the instrumentalities for the convenient administration of local

government; upon them, subject to constitutional limitations, the legislature may confer the power to tax to the extent necessary to good government and the imposition of a tax by cities, counties or towns for their support is as much an exercise of the taxing power of the State as a tax imposed directly by the State. (25 Am. & Eng. Enc. of Law, 80, 1st ed.) The power to assess is but an incident of the power to tax. The function of assessing for the purpose of taxation is a governmental agency for the proper division of the burdens of taxing and is but one of the elements in rendering the power of taxation effective.

In the *Town of Guilford v. Supervisors of Chenango, supra,* it was said, "Our State government is an independent existence, representing the sovereignty of the people. The power of the legislature is the power of that sovereignty, and is supreme in all respects,
400 and unlimited in all matters pertaining to legitimate legislation, except in those instances where the people have, in their fundamental law, limited or restricted it. Taxation is indisputably a legislative power. The constitution of this State will be searched in vain for any clause which contains any restriction or limitation on the taxing power of the legislature."

If the legislature possesses such power with respect to taxation I can see no reason why with respect to a function which is but a part of the governmental machinery in carrying into effect the laws relating to taxation the legislature may not lawfully provide, as has been done by the amendment in question, that the State Board of Tax Commissioners may value the tangible property in the streets as a portion of the special franchises made taxable by the amendment.

The State has a direct interest in local assessments, for upon these assessments State as well as local taxes are paid. It has an indirect interest in them so far as they are made the basis of local taxation, because of its regard for the efficiency of local government and for the well being of all the municipalities which go to make up the State.

At the time of the adoption of the earlier constitutions, when it is claimed that the principle of local assessments became a part of our governmental system, there was not a railroad track, a telegraph line, a gas main or an electrical subway in existence. The right to assess and tax these various kinds of property in the streets has from time to time, and mostly in comparatively recent years, been conferred upon the local authorities by the legislature. If the legislature can increase the powers and functions of the assessors, as it has done repeatedly, why may it not take from these powers and functions, at least to the extent of that which it has given. If this tangible property in the streets had always been taxable there
401 would be more force in the contention that the local assessors had a constitutional right to value it for taxation, but the right to assess it at all has been given since the adoption of the earlier constitutions and this right is all that has been withdrawn by the act in question.

The constitution has not stood in the way of the withdrawal by the State of various functions from many local officers other than assessors and conferring such functions upon officers appointed by central or State authority. This principle has been sanctioned by the court of appeals in many cases. It was done as to police officers in *People v. Draper*, 15 N. Y., 532, and *People v. Shepard*, 36 N. Y., 285; as to firemen in *People v. Pinckney*, 32 N. Y., 377; as to commissioners of excise in *Board of Excise v. Barrie*, 34 N. Y., 657; as to health officers in *Board of Health v. Heister*, 37 N. Y., 661; as to officers having supervision of street improvements in *Astor v. The Mayor, etc., of New York*, 62 N. Y., 567; as to commissioners of highways in *People ex rel. Kilmer v. McDonald*, 69 N. Y., 362, and as to boards of supervisors in the erection of public buildings in *People ex rel. Commissioners, etc., v. Supervisors of Oneida Co.*, 170 N. Y., 105.

But it is said that the decisions in these cases and in others of analagous character, were justified in the exercise of the police power of the State, and not otherwise. The court, however, failed to put its decision in most of these cases on that ground, nor did it give that question any prominence in any of them. Other sufficient reasons were found for the conclusions reached.

While it is entirely correct to say that the State has a great interest in maintaining good order through an efficient police force, in the protection of property and lives by well conducted fire departments, in promoting the public health, in the regulation
402 of the liquor traffic, in the maintenance of good roads and in other public improvements, yet none of these matters are of greater concern to the State than the power to exist, which depends upon the right in the legislature to levy taxes and, as incidental thereto, to have some power concerning assessments for that purpose.

The cases which are cited to support a contrary doctrine are cases where the legislature attempted to abolish local *offices* in the face of the express terms of the constitution, and confer the functions of such officers upon officers of State selection. The case of *The People v. Raymond*, 37 N. Y., 428, is one of these cases.

The appellant relies largely upon that case for its contention that the assessment of property for the purpose of taxation is exclusively a local function. That was an action to determine the title of the defendant to the office of commissioner of taxes and assessments of the city and county of New York and the only question in the case was as to whether or not an act of the legislature under which the defendant was appointed to that office by the governor and senate violated the home rule provisions of the constitution and it was held that it did, and that the legislature could not create a new office and vest the appointment in a central or State authority when the duties of the office were those of a former county or city officer made elective by the constitution. While it was said in that case that "there is no question but that the office in question is exclusively a city office," it was not there decided, nor could it have been, for the question was not up, that the function of assessing property for the pur-

pose of taxation was exclusively a local function. The case is therefore not an authority for that proposition, nor do I know of any case that is. I think the question is an open one and must be decided in this case as a new proposi-
403 tion. That the *Raymond* case is not conclusive on this question, it seems to me, is clearly indicated by the court of appeals in the later case of *Astor v. The Mayor, supra*, where it was held *that a law that took from local officers and conferred upon the commissioners* of Central park, who were officers appointed by the legislature, the exclusive care, management and control for the purpose of regulating, grading and improving certain streets in the city of New York, was not unconstitutional, and where it was stated in the opinion of the court that, "it would be carrying the doctrine of non-interference with local officers far beyond any reported case, to hold that in no case whatever could any of the powers existing in a local officer, at the time of the adoption of the constitution, be taken away without violating the provision cited."

The intangible property, constituting a part of these special franchises, is made taxable by the amendment in question for the first time. It is of very large value. It is so closely related to and so inseparably connected with the tangible property in the streets, constituting a part of the special franchises, that it would be very difficult, if not impracticable to value the intangible, separate and distinct from the tangible property. (*People v. O'Brien*, 111 N. Y., 1.) The State board has not so valued it in this case and this court has held in an unreported case that a provision in a writ of *certiorari* requiring that board to state the values upon the tangible and intangible property separately was not justified under the law.

Nor is it practicable for special franchises, in many instances, to be valued by local assessors without extending their functions and jurisdiction beyond their tax districts, for the reason that such fran-
chises frequently cover property extending into several tax
404 districts and the property in one district would have little value when disconnected with the property in the other districts but would have great value when taken as a part of the whole. It is also a kind of property requiring expert knowledge on the part of those who are to value it and knowledge which few local assessors possess.

To hold that the legislature cannot commit to a State authority the duty of valuing for the purpose of taxation tangible property in the streets to the extent permitted by the amendment in question and under the circumstances existing here, requires, in my opinion, an altogether too strict and illiberal a construction of the constitution.

I think the legislature had the right not only to subject the large amount of intangible property existing as a part of these special franchises to the taxing power of the State but also to provide, as it did, in view of the changed conditions arising from the advancement and progress of our people over those which formerly existed, for the assessment of this intangible and tangible property together, by

State officers, and that in so doing it has still left to the localities as large a measure of home rule as they enjoyed in this respect, when the local function of assessing property for taxation became part of our system.

So far reference has been had to the validity of the amendment under the State constitution. With reference to its validity under the Federal Constitution and to all the other questions discussed by the learned referee in the various opinions written by him, I agree with his reasoning and also with his conclusion and that of the special term, that the amendment is a valid exercise of legislative power.

I think the order should be affirmed with costs.

405 *Notice of Appeal.*

Supreme Court, Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of New Amsterdam Gas Company, Respondent,
against
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. Stearns, Tax Commissioners, Composing the State Board of Tax Commissioners, Appellants.

SIRS: You will please take notice, that the above named appellants, George E. Priest, J. Edgar Leaycraft and Lester F. Stearns, together constituting the State board of tax commissioners of the State of New York, hereby appeal to the court of appeals of the State of New York from the final order of the appellate division of the supreme court, third department, entered in the office of the clerk of the county of Albany, on the 30th day of January, 1903, and from the whole of said order, except that part thereof which affirms the order of the special term herein upon the facts.

Dated February 2, 1903.

Yours, etc.,

JOHN CUNNEEN,
Attorney-General,
Attorney for Appellants, Capitol, Albany, N. Y.

To the clerk of the county of Albany and to John C. Tomlinson, attorney for relator-respondent.

406 *Stipulation.*

Court of Appeals, State of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of New Amsterdam Gas Company, Respondent,
against
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Tax Commissioners, Composing the State Board of Tax Commissioners, Appellants.

It is hereby stipulated under section 3301 of the Code of Civil Procedure that the foregoing are true and correct copies of all of the papers and evidence upon which the court below acted in making the order on file in the office of the clerk of Albany county and of all the evidence and papers upon appeal herein upon which this proceeding was heard in the appellate division of the supreme court, the memorandum of decision by the appellate division, the order of the appellate division, the opinions of Parker, P. J., and Kellogg, Smith and Chester, JJ., and the notice of appeal to the court of appeals, and certification thereof as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated February 9th, 1903.

JOHN CUNNEEN,
Attorney-General, Attorney for Appellants.
JOHN C. TOMLINSON,
Attorney for Relator-Respondent.

407 At a special term of the supreme court of the State of New York, held at the court house in the city of Albany, N. Y., on the 20 day of June, 1903.

Present: Hon. D. Cady Herrick, justice.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERDAM Gas Company
vs.
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Constituting the State Board of Tax Commissioners of the State of New York.

This cause having been brought on upon the remittitur herein, sent down from the court of appeals, and now filed with this court, by which remittitur it appears that an appeal was taken by the defendants herein, from the order of the appellate division of this court to the said court of appeals, and that upon such appeal the said order of the appellate division of this court was reversed, and the order of the special term herein affirmed by such court, with costs, and that the record of proceedings had been directed by said

court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals, according to law.

408 Now, therefore, on motion of John Cunneen, attorney general, attorney for the respondents,

It is ordered and adjudged, that the judgment of the said court of appeals be and the same hereby is made the judgment of this court; and that the respondents George E. Priest, J. Edgar Leaycraft and Lester F. Stearns, as constituting the State board of tax commissioners of the State of New York, have execution against The New Amsterdam Gas Company, relator, for their costs, when adjusted by the clerk, and inserted in this judgment, and that this order or judgment be annexed to the judgment-roll.

Enter.

D. CADY HERRICK,
Jus. Sup. Ct.

409 [Endorsed:] Supreme court. People *ex rel.* New Amsterdam Gas Company, *vs.* George E. Priest, *et al.*, constituting the State board of tax commissioners. Original. Order. John Cunneen, attorney-general, capitol, Albany, N. Y. Filed Albany county, N. Y. Jun- 22, 2.18 p. m., 1903 Clerk's office.

410 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERdam Gas Company
vs.
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Constituting the State Board of Tax Commissioners of the State of New York.

An order in this proceeding in favor of the respondents and against the relator having been made by the special term of this court on the 15th day of July, 1902, and duly entered in the office of the clerk of the county of Albany on said date, upon the report of a referee, reducing the assessment of the special franchise of the relator, as it appears upon the assessment-roll of the city of New York for the year 1900, from the sum of four millions, four hundred twenty six thousand, six hundred fifteen dollars to the sum of two millions, nine hundred sixty-five thousand, seven hundred ninety-two and 94/100 dollars, and confirming the assessment of said special franchise, as so corrected and reduced, and the relator having appealed from said order to the appellate division of this court for the third department, and the said order having been affirmed upon the facts and reversed upon the law by the appellate division of this court aforesaid, and the order of reversal thereon having been rendered on the 6th day of January, 1903, and the respondents having appealed therefrom to the court of appeals, and the

said court of appeals have sent hither its remittitur, filed
411 herein on the first day of May, 1903, by which it appears that the said court of appeals has reversed the order of the appellate division herein, and affirmed that of the special term, with costs, and has given judgment accordingly, and has remitted the judgment of the said court of appeals to this court, to be enforced according to law, and this court having by an order entered herein the 22 day of June, 1903, ordered that said judgment be made the judgment of this court, and the respondents' costs having been adjusted at the sum of two hundred twenty-seven & 51 / 100 dollars,

Now, on motion of John Cunneen, attorney general, attorney for the respondents,

It is adjudged, that the judgment of the said court of appeals be and the same is hereby made the judgment of this court, and

It is further adjudged, that the respondents George E. Priest, J. Edgar Leaycraft and Lester F. Stearns, constituting the State board of tax commissioners of the State of New York, recover of the relator The New Amsterdam Gas Company, the sum of two hundred twenty-seven & 51 / 100 dollars, their costs, as adjusted herein, and that they have execution therefor.

JOHN FRANEY.

Dated, June 22nd, 1903.

412 [Endorsed:] B. 81 P. 303 7 Supreme court. People *ex rel.* New Amsterdam Gas Company, *vs.* George E. Priest, *et al.*, constituting the State board of tax commissioners. Original. Judgment. John Cunneen, attorney-general, capitol, Albany, N. Y. Filed Albany county, N. Y. Jun- 22 2.18 p. m. 1903 Clerk's office.

413 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court of the State of New York on a remittitur from the court of appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had, before you, or some of you, between The People of the State of New York *ex rel.* New Amsterdam Gas Company, plaintiff-respondent, and The State Board of Tax Commissioners, defendant-appellant, wherein was drawn in question the validity of a statute of and an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said People of the State of New York *ex rel.* New Amsterdam Gas Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and

speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme Court, that, the record, and proceedings aforesaid being inspected, the said Supreme Court
414 may cause further to be done therein to — that error *which* of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 27th day of June, in the year of our Lord one thousand nine hundred and three.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States for the Northern District of New York,
By C. W. HIGGISON, *Deputy.*

Allowed by
R. W. PECKHAM,
Associate Justice of the United States Supreme Court.

415 [Endorsed:] Supreme Court of the United States. People of the State of New York *ex rel.* New Amsterdam Gas Company, pl'ff in error, against State Board of Tax Commissioners of the State of New York, def't in error. Original Writ of error. Boardman, Platt & Soley, attorneys for pl'ff in error, No. 35 Wall street, New York city. Filed Albany county, N. Y. Jun- 29 11.34 a. m. 1903. Clerk's office.

416 Supreme Court of the United States.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERDAM Gas Company, Plaintiff in Error,
against
STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF NEW York, Defendant in Error.

Petition for Writ of Error.

Now comes The New Amsterdam Gas Company, the above named relator, by Boardman, Platt & Soley, its attorneys, and says that on the 28th day of April, A. D. 1903, the court of appeals of the State of New York made and entered a final order and judgment herein, in favor of The State Board of Tax Commissioners, defendant in error above named, and against The People of the State of New York, *ex rel.* New Amsterdam Gas Company, plaintiff

in error above named, and afterwards, and on the 22nd day of June A. D. 1903, the records and proceedings in said cause having been remitted to the supreme court of the State of New York in and for Albany county, said final order and judgment of the court of appeals were made and entered as the final order and judgment of said supreme court, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the said relator, all of which will more in detail appear from the assignment of errors which is filed with this petition.

The said court of appeals of the State of New York is the
417 highest court of the said State of New York in which a decision in this cause could be had.

Wherefore, your petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the supreme court of the State of New York for the correction of the errors and reversal of the judgment so complained of; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States, that said writ of error operate as a supersedeas, that the amount of security which the petitioner shall give and furnish on said writ of error may be fixed, and that upon the giving of such security, all further proceedings in said court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated the 25th day of June, 1903.

BOARDMAN, PLATT & SOLEY,
Attorneys for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed, and the bond is fixed at the sum of $1000.

Dated the 26th day of June, A. D., 1903.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

418 [Endorsed:] Supreme Court of the United States. People of the State of New York *er rel.* New Amsterdam Gas Company, pl'ff in error, against State Board of Tax Commissioners of the State of New York, def't in error. Original. Petition for writ of error. Boardman, Platt & Soley, attorneys for pl'ff in error, No. 35 Wall street, New York city. Filed Albany county, N. Y., Jun- 29 11.34 a. m. 1903 Clerk's office.

419 Supreme Court of the United States.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERDAM Gas Company, Plaintiff in Error,
against
STATE BOARD OF TAX COMMISSIONERS OF THE STATE OF NEW York, Defendant in Error.

Assignment of Errors.

Now comes The New Amsterdam Gas Company, the above named relator, by Boardman, Platt & Soley, its attorneys, and in connection with the petition for a writ of error filed herewith, says that in the records and proceedings in this cause and in the final order and judgment made and entered herein on the 22nd day of June, A. D. 1903, by the supreme court of the State of New York, on a remittitur from the court of appeals of the State of New York, there is manifest error in this, to wit:

I.

Error in declining to hold that the act of the legislature of the State of New York, approved May 26th, 1899, (ch. 712, L. 1899), entitled "An act to amend the tax law, in relation to the taxation of public franchises as real property," in so far as it authorizes the assessment imposed by the State Board of Tax Commissioners on March 20, 1900, upon the franchises of The New Amsterdam Gas Company, relator above named, deprives said relator of its property without due process of law, in contravention of the fourteenth amendment of the Constitution of the United States.

420 II.

Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, denies to said relator the equal protection of the laws, in contravention of the fourteenth amendment to the Constitution of the United States.

III.

Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, impairs the obligations of contracts in contravention of section 10, article I. of the Constitution of the United States.

Dated the 25th day of June, 1903.

BOARDMAN, PLATT & SOLEY,
Attorneys for Petitioner.

421 [Endorsed:] Supreme Court of the United States. People of the State of New York *ex rel.* New Amsterdam Gas Com-

pany, pl'ff in error, against State Board of Tax Commissioners of the State of New York, def't in error. Original. Assignment of errors. Boardman, Platt & Soley, attorneys for pl'ff in error, No. 35 Wall street, New York city. Filed Albany county, N. Y. Jun- 29 11.34 a. m. 1903 Clerk's office.

422 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the State Board of Tax Commissioners and John Cunneen, attorney general of the State of New York, its attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, for the county of Albany, in an action wherein The People of the State of New York *ex rel.* New Amsterdam Gas Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. W. Peckham associate justice of the Supreme Court of the United States, this 26th day of June, in the year of our Lord one thousand nine hundred and three.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Copy of the above citation received by me at the office of the attorney-general of the State of New York, this 29 day of June, A. D., 1903.

JOHN CUNNEEN,
Attorney-General.

423 [Endorsed:] Supreme Court of the United States. People of the State of New York *ex rel.* New Amsterdam Gas Company, pl'ff in error, against State Board of Tax Commissioners of the State of New York, def't in error. Original Citation. Boardman, Platt & Soley, attorneys for pl'ff in error, No. 35 Wall street, New York city. Filed Albany county, N. Y. Jun- 29 1.52 p. m. 1903 Clerk's office.

424 *Bond on Writ of Error.*

Know all men by these presents, that we, The New Amsterdam Gas Company, a corporation, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto the State Board of Tax Commissioners

in the full and just sum of one thousand dollars ($1000.00) to be paid to the said State Board of Tax Commissioners, its successors and assigns, to which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated the twenty-third day of June, in the year of our Lord, nineteen hundred and three.

Whereas, lately in the supreme court of the State of New York, in a suit pending in said court between said People of the State of New York *ex rel.* New Amsterdam Gas Company, plaintiff respondent, and said State Board of Tax Commissioners, defendant-appellant, a judgment was rendered on a remittitur from the court of appeals of the State of New York against said People of the State of New York *ex rel.* New Amsterdam Gas Company, plaintiff-respondent, in favor of said State Board of Tax Commissioners, defendant-appellant, and said plaintiff-respondent having obtained from a justice of the Supreme Court of the United States, a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse said judgment in the aforesaid suit, and a citation directed to said State Board of Tax Commissioners, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, District of Columbia, within thirty days from date thereof.

Now, the condition of the above obligation is such, that if the said New Amsterdam Gas Company, a corporation as aforesaid, shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the
425 above obligation to be void, otherwise to remain in full force and effect.

[SEAL.] NEW AMSTERDAM GAS COMPANY,
(S'g'd) By MALCOLM M. GRAHAM, *Sec.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
[SEAL.] By HENRY B. PLATT, *Vice-President.*

Attest: JAMES R. KINGSLEY, *Attorney-in-fact.*

Sealed and delivered in the presence of:
(S'g'd) GEORGE W. FIELD.

STATE OF NEW YORK, }
County of New York, } *ss:*

On this 25 day of June, 1903, before me personally came Malcolm M. Graham, to me known, who being by me duly sworn, did depose and say that he resided in New York city, that he is the secretary of the New Amsterdam Gas Company, the corporation described in and which executed the above instrument, and that he knew the seal of said corporation, that the seal affixed to said instrument was such corporate seal, that it was so affixed by order of the

board of directors of said corporation, and that he signed his name thereto by like order.

[SEAL.]

JAMES T. CRANE,
Notary Public, New York City.

426 STATE OF NEW YORK, } ss:
County of New York, }

On the 23rd day of June, in the year 1903 before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the Year 1893. And the said Henry B. Platt further said that he was acquainted with James R. Kingsley, and knew him to be the attorney-in-fact of said company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the board of directors, and in the presence of him the said Henry B. Platt.

ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the board of directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the company, in the city of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"*Resolved*, That in pursuance of section eight hundred and eleven "of the Code of Civil Procedure of the State of New York, Henry B. "Platt, vice-president, or George Sewell Bonner, attorney, or Frank H. "Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood and "James R. Kingsley, attorneys-in-fact of this company, in the State "of New York, be, and each of them is, hereby authorized and em-"powered to sign, execute and deliver any and all bonds or under-"takings for or on behalf of this company, and to attach thereto the "seal of the corporation, the same to be attested by the said George "Sewell Bonner, attorney of the company, or by either one of the "other persons above named, as occasion may require."

COUNTY OF NEW YORK, ss:

I, James R. Kingsley, attorney-in-fact, of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said com-

pany, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution. Given under my hand and the seal of the company, at the city of New York, this 23rd day of June, 1903.

JAMES R. KINGSLEY,
Attorney-in-fact.

Fidelity and Deposit Company of Maryland.

Statement, December 31st, 1902.

Resources.		*Liabilities.*	
Real estate	$670,000 00	Capital stock	$2,000,000 00
Stocks and bonds	2,723,100 00	Surplus and undivided profits	2,876,233 57
Railroad bonds	2,059,600 00	Premium reserve	717,297 87
Net premiums due	102,807 25	Claims in process of adjustment	31,012 45
Cash in bank, etc	235,058 63	Claims reported	166,021 99
	$5,790,565 88		$5,790,565 88

STATE OF NEW YORK, }
County of New York, } ss.:

James R. Kingsley, being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31st, 1902, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 23rd day of June, 1903.

ERNEST L. HICKS,
Notary Public, New York County.

The foregoing bond and surety is hereby approved this 26th day of June, A. D. 1903.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

427 [Endorsed:] Supreme Court of the United States. People of the State of New York *ex rel.* New Amsterdam Gas Company, plaintiff in error, against State Board of Tax Commissioners, defendant in error. Copy Bond. Boardman, Platt & Soley, att'ys for pl'ff in error, 35 Wall street, borough of Manhattan, New York city. Fidelity and Deposit Company of Maryland 35 Wall street, New York.

428 STATE OF NEW YORK, } ss:
County of Albany, }

I, John Franey, clerk of said county and also clerk of the supreme court of State of New York, held therein, do hereby certify that the annexed record of papers on appeal to the court of appeals of said State, remittitur issued by and from said court of appeals, the order of the supreme court pursuant to the said remittitur and the judgment in pursuance of said order thereon, are the originals thereof, entered and filed in this office; that attached thereto are the writ of error with allowance thereon; the petition for said writ with allowance thereof and fixing amount of security therefor, made thereon; the citation with acceptance of service thereof; assignment of errors, and the same are the originals thereof; and a copy of the bond on writ of error, which I have compared with the original thereof on file in this office and find the same to be a true copy of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed my official seal this 29 day of June 1903.

[Seal Albany County, July, 1847.]

JOHN FRANEY,
Clerk of Albany County and of Supreme Court of State of New York.

429 THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* METROPOLITAN STREET RAILWAY COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE TWENTY-THIRD STREET RAILWAY COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE CENTRAL CROSSTOWN RAILROAD COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* CONSOLIDATED GAS COMPANY OF NEW YORK, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* BROOKLYN CITY RAILROAD COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERDAM GAS COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

1. Constitutional law—Transfer of essential functions of local officers to State officers prohibited—Home rule provision const. art. 10, § 2.—The home rule provision of the constitution (art. 10, § 2) providing that "all city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such
430 authorities thereof, as the legislature shall designate for that purpose," protects all essential or exclusive functions theretofore belonging to local officers and prohibits their transfer, whether direct or indirect, to State officers.

2. Construction of home rule provision as affecting taxation.—This provision, however, when invoked in relation to taxation should be considered in connection with the supreme taxing power of the legislature and neither should be so construed as to embarrass or cripple the other. Home rule, as understood and practiced in the past, giving to localities the right to govern themselves, but not to hamper the government of the State, should be carefully protected from open attack or indirect invasion. Shadows, however, should give way to substance, and the right to create a new system of taxation

and bring in property of a new character, hitherto untaxed, with some other property incidental thereto and worthless without it, cannot be denied upon principle and should not be withheld from the legislature.

3. Corporations—General franchises defined.—The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the State. Such franchise, however, gives the corporation no right to do anything in the public highways without special authority from the State or some municipal officer or body acting under its authority.

4. Special franchises defined.—A special franchise is the right granted to a corporation to construct, maintain or operate in a public highway some structure intended for public use, which except for the grant would be a trespass.

5. Tax—Special franchise tax act—L. 1899, ch. 712—Substance of statute.—Chapter 712 of the Laws of 1899, amending the general tax law and authorizing for the first time in the history of the State the assessment or valuation for the purpose of general taxation of all special franchises by a State board of tax commissioners appointed by the governor, declares in substance that the right, authority or permission to construct, maintain or operate some structure, intended for public use, "in, under, above, on or through streets, highways, or public places," such as railroads, gas pipes, water mains, poles and wires for electric, telephone and telegraph lines, and the like, is a special franchise. For the purpose of taxation such a franchise is made real estate and is "deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise," and taxed as a part thereof. (§ 2, subd. 3.) This includes nothing but what is in the street, directly or indirectly, and excludes power houses, depots and all structures without the lines of the street. The taxes thus imposed are for general purposes, are collected in the same way, and used for the same objects as other taxes upon the general assessment roll.

6. Act not violative of home rule provision—It creates new system of taxation, requiring officers with new functions to en-
431 force it—Tangible property connected with special franchises is an inseparable part thereof, forming an entity which was never taxable by local assessors.—The fact that such statute confers upon State officers the right to assess such franchises and especially the right to assess the tangible property annexed thereto and included therein by the act, which was formerly assessed by local boards of assessors, does not violate the principle of home rule embodied in the constitution. 1. Because it creates a new system of taxation and brings within its range a new character of property, which re-

quired new methods of valuation and the exercise of functions which never belonged to local assessors and must necessarily have been committed to State officers with new functions whose sole duty related to the subject of taxation in all its phases throughout the entire State, and who, with wider experience and greater opportunities for observation than local assessors, would be able to grasp the new scheme of taxation as a whole and whose action would be free from all local prejudice or color and uniform in its result. 2. Because the tangible property formerly assessed by local assessors is an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which in a going concern can neither be assessed nor sold to advantage except as one thing, single and entire, and the function of assessing such entity is not essentially local in character, never belonged to localities, never was and never could be exercised with the requisite justice and uniformity by their officers, and, therefore, was of necessity conferred upon State officers, expert tax officials, having a jurisdiction coextensive with the limits of the State. Property, therefore, created by the legislature and never intrusted by it to local assessors cannot with propriety be said to have been taken away from them.

7. Authorities on home rule question collated.—The authorities relating to the home rule provision of the constitution collated and discussed.

8. Decisions, not expressions of judges used *arguendo*, establish legal principles.—Legal principles are not established by expressions of learned judges, used *arguendo* in their opinions in a given case, but by what was decided therein, and what is written is not evidence of what was decided unless it relates directly to the question presented for decision.

9. Franchises taxable as other property—Act is not violative of Federal Constitution as impairing the obligation of contracts.—A franchise, whether general or special, is taxable the same as other property, and, therefore, the statute taxing special franchises, which changes no part of the grant, alters no stipulation, increases no payment, exacts nothing from their owners that is not exacted from the owners of property generally, does not impair the obligation of a contract and cannot be regarded as violating the Federal Constitution.

10. Additional objections overruled.—Contentions that the act is impracticable and incapable of execution; that the special fran-
432 chises should have been separately assessed; that the State Tax Commissioners adopted no rule in making the assessments; that the relators did not have a proper hearing at the time provided for review, and that due process of law was

not observed in the taxation of their property, after due consideration, are overruled.

People ex rel. Met. St. R'y Co. v. Tax Com'rs, 79 App. Div. 184, reversed.

People ex rel. T. T. St. R'y Co. v. Tax Com'rs, reversed.

People ex rel. C. C. R. R. Co. v. Com'rs, reversed.

People ex rel. N. A. Gas Co. v. Tax Com'rs, 79 App. Div. 643, reversed.

People ex rel. C. Gas Co. v. Tax Com'rs, 79 App. Div. 643, reversed.

People ex rel. C. I. & B. R. R. Co. v. Tax Com'rs, 79 App. Div. 643, reversed.

People ex rel. B. C. R. R. Co. v. Tax Com'rs, 79 App. Div. 643, reversed.

(Argued April 6, 1903; decided April 28, 1903.)

Appeal in each of the above-entitled proceedings from an order of the appellate division of the supreme court in the third judicial department, entered January 30, 1903, which reversed an order of special term reducing and confirming as reduced an assessment upon the special franchises of the respective relators.

The assessments in question were made in the year 1900, pursuant to the provisions of the tax law, as amended by chapter 712 of the Laws of 1899. Separate writs of certiorari, granted to review the respective assessments, resulted in an order in each proceeding appointing a referee to take and report to the supreme court such evidence upon the several issues raised by the petition, writ and return as might be adduced before him by the parties, with his findings of fact and conclusions of law thereon. After taking many pages of evidence the referee made separate and complete findings of fact appropriate to each proceeding, and as conclusions of law in each found "that chapter 712 of the Laws of 1899 is a valid and constitutional enactment, practicable and operative, and that it gave authority to the defendants to assess the relator's special franchises for the purpose of assessment and taxation; that the relator had a hearing and due process of law before the defendants upon the review of its assessment * * * and was not deprived of any of its legal or constitutional
433 rights; that it was lawful to assess as one franchise the franchise, right, authority or permission which the relator had in the streets of New York and which it operated as one system; that to equalize its assessment with the assessment of other real property in the city of New York, the relator is entitled to a deduction," the amount being named in each proceeding, "and that the assessment as thus reduced must be taken as the value of the relator's special franchise for the purposes of assessment and taxation under the act."

The supreme court adopted the findings both of fact and law made by the referee and directed that final orders be entered in accordance therewith. From the order so entered in each proceeding the

relator therein appealed to the appellate division, which affirmed as to the facts but reversed as to the law, upon the ground that the statute in question was in violation of the "home rule" provision of the constitution. Two of the justices dissented. The State Board of Tax Commissioners appealed to this court from the several orders entered accordingly.

John Cunneen, attorney-general (*William H. Wood* of counsel), for appellant. The entire statute is valid. There is no arbitrary line which separates the official functions which properly belong to local officers from those which properly belong to State officers. The power to make the distinction is vested in the legislature. (Const. of 1777, § 20; Const. of 1821, art. 4, § 15; Const. of 1846, art. 10, § 2; *Matter of Henneberger*, 155 N. Y. 421; *People ex rel. v. Albertson*, 55 N. Y. 50; *Matter of N. Y. D. R'y Co.*, 42 Hun, 621; 107 N. Y. 42; *People ex rel. v. Lorillard*, 135 N. Y. 285; *Rathbone v. Wirth*, 150 N. Y. 459; *N. Y. F. Dep't v. A. S. Co.*, 106 N. Y. 577; *People v. Cheritree*, 6 T. & C. 473; *Greaton v. Griffin*, 4 Abb. Pr. [N. S.] 310; *Hanlon v. Bd. of Suprs.*, 57 Barb. 383; *City of Syracuse v. Hubbard*, 64 App. Div. 587.) It is within the power of the legislature to create a new office to be filled by a State officer and to transfer the power of valuing property to it, even though this power has, since
434 before 1777, been exercised by local assessors. (*Matter of Allison v. Welde*, 172 N. Y. 421; *People v. Raymond*, 37 N. Y. 431.) The subject of assessment and taxation is the "right," "privilege" or "franchise" to occupy a street. The "tangible" property employed in the exercise of this right is merely incidental to the right. Prior to the enactment of chapter 712 of the Laws of 1899 the property thereby rendered assessable had never been assessed locally and, therefore, the local assessors are deprived of no function. (*Matter of N. Y., W. S. & B. R. R. Co.*, 37 Hun, 317; *Ritchmyer v. Morss*, 3 Keyes, 349; *Matter of McPherson*, 104 N. Y. 306; *Matter of Romaine*, 127 N. Y. 80; *People v. H. Ins. Co.*, 92 N. Y. 328; *H. Ins. Co. v. New York*, 134 U. S. 594.) The franchises granted by the municipal authorities to the relators herein to use public streets are property. (*People v. O'Brien*, 111 N. Y. 1; *People v. Deehan*, 153 N. Y. 528; *Ingersoll v. N. E. R. R. Co.*, 157 N. Y. 453.) The grant of property by the State or by a municipal corporation, upon payment therefor of a consideration, payable either in gross or by annual payments, and expressed in the grant, does not carry with it any implied condition or agreement that the property so granted shall be forever thereafter exempted from taxation. Taxation of the property so granted is not an impairment or change of the contract by which the grant was made. (*People ex rel. v. Board of Commissioners*, 76 N. Y. 64; *People v. Commissioner of Taxes*, 82 N. Y. 459; *People ex rel. v. Davenport*, 91 N. Y. 574; *Delaware Railroad Tax*, 18 Wall. 206; *M. G. L. Co. v. Shelby County*, 109 U. S. 398; *N. O., C. & L. R. R. Co. v. New Orleans*, 143 U. S. 192; *Ford v. D. & P. L. Co.*, 164 U. S. 662.) A law which imposes a tax upon property for public use and in which provision is made for notice to the person taxed, a hearing before the assessing officers, and

an opportunity for review by the courts does not take property without due process of law. (*Kentucky R. R. Tax Cases*, 115 U. S. 321; *McMillen v. Anderson*, 95 U. S. 37; *Lent v. Tillson*, 140 U. S. 316; *Palmer v. McMahon*, 133 U. S. 660; *Paulsen v. Portland*, 149 U. S. 30; *Stuart v. Palmer*, 74 N. Y. 183.) It is possible to ascertain the value of a special franchise with substantial correctness and the act is not void from impracticability. (*People v. Davenport*, 91 N. Y. 574; *People v. Feitner*, 54 App. Div. 217; *People v. Coleman*, 107 N. Y. 541; *People ex rel. v. Barker*, 144 N. Y. 94; *People ex rel. v. Barker*, 146 N. Y. 304; *C. S. Ry Co. v. Common Council*, 125 Mich. 673; *A. E. Co. v. State Auditor*, 166 U. S. 185.) The assessments are not illegal, because several special franchises belonging to the same corporation and all in the same tax district, were assessed as a unit and not separately. (*People ex rel. v. Feitner*, 65 App. Div. 318; 169 N. Y. 604; *C. S. R. R. Co. v. Common Council*, 125 Mich. 683.)

David B. Hill for respondents. The function of assessment for the purposes of taxation is inherently a local function and adheres to the counties, cities, towns and villages of the State with substantially the like effect as though there was an express provision therefor in the constitution, and such function cannot be transferred to officials not elected or appointed by such localities. (*People v. Raymond*, 37 N. Y. 428; *Matter of Brenner*, 170 N. Y. 185; *People v. Albertson*, 55 N. Y. 50; *Rathbone v. Wirth*, 150 N. Y. 459; *People ex rel. v. McKinney*, 52 N. Y. 374; *People ex rel. v. Crooks*, 53 N. Y. 648; *People ex rel. v. Foley*, 148 N. Y. 677; *People ex rel. v. Randall*, 151 N. Y. 497; *People ex rel. v. Palmer*, 154 N. Y. 133.)

Charles F. Brown, *David B. Hill*, *Frank H. Platt*, and *William H. Page, Jr.*, for Metropolitan Street Railway Company, respondent. The effect of the special franchise tax law is to transfer to the office of State Tax Commissioners the function of assessing a large class of property for local purposes, which, at the adoption of the constitution, was a function of the office of city, town or village assessors. This the legislature had no power to do. (*People* 436 *v. Raymond*, 37 N. Y. 428; *People ex rel. v. McKinney*, 52 N. Y. 374; *People v. Albertson*, 55 N. Y. 50; *Matter of Brenner*, 170 N. Y. 185; *Matter of Allison v. Welde*, 172 N. Y. 421; *People v. Draper*, 15 N. Y. 532.) The assessment of property has always been the function of a local officer. (1 Dowell's Hist. of Taxation, 70, 74; 1 Stubbs' Const. Hist. of England [3d ed.], chs. 12, 14, 15; Howard's Local Const. Hist. of U. S. ch. 4, subd. 6; *People v. Harding*, 53 Mich. 481; *People v. Hurlburt*, 24 Mich. 44; *Slaughter House Cases*, 16 Wall. 36.) The assessment of property for the purposes of taxation is a function of local officers, who are required to be selected as provided by section 2 of article 10 of the constitution. (*People v. Raymond*, 37 N. Y. 428; *Warner v. People*, 2 Den. 272; *People v. Albertson*, 55 N. Y. 50; *People v. Priest*, 169 N. Y. 432.) The special franchise tax law cannot be sustained upon the fact that a franchise to use streets, highways and public places was not at the adoption of the constitution subject to direct taxation, or upon the theory that

the relation between the franchise and the tangible property in connection therewith is such that the legislature is justified in withdrawing the latter from the jurisdiction of local assessors and requiring both classes of property to be assessed together by State officials. (L. 1900, ch. 254, § 42; *People v. Albertson*, 55 N. Y. 50.) The special franchise tax law cannot be sustained upon the grounds that the amount of property withdrawn from the jurisdiction of local assessors is so inconsiderable that the home rule principle of the constitution is not violated. (*McCulloch v. Maryland*, 4 Wheat. 316; *Met. Bd. of Excise v. Barrie*, 34 N. Y. 657.) The contention that it is within the power of the legislature to take to itself and resume the appointment and control of offices for the purpose of performing administrative duties throughout the whole State, even though such administrative duties were at the adoption of the constitution performed by local officers in the cities, towns and villages of the State for local purposes, cannot be sustained. (Dillon on Mun. Corp. [4th ed.] § 12;
437 *Rathbone v. Wirth*, 150 N. Y. 459; *People v. Hurlburt*, 24 Mich. 44; *People v. Acton*, 48 Barb. 524; *Devoy v. Mayor, etc.*, 36 N. Y. 449; *People v. Pinckney*, 32 N. Y. 377; *People ex rel. v. Common Council*, 28 Mich. 228; *Att'y-General v. Bd. of Councilmen*, 58 Mich. 213; *City of Evansville v. State*, 118 Ind. 427; *State ex rel. v. Deemy*, 118 Ind. 382; *People v. Shepherd*, 36 N. Y. 285.) The Board of Tax Commissioners erred in assessing all the special franchises of the relator as a single franchise instead of "fixing and determining the value of each" as required by section 42 of the tax law. (*May v. Traphagen*, 139 N. Y. 478.) The contention that the relator is the owner of several special franchises and that each is a separate piece of property is sustained by consideration of the legal character of the property and by the provisions of law applicable thereto. (*May v. Traphagen*, 139 N. Y. 478; *People ex rel. v. Dolan*, 126 N. Y. 166; *People ex rel. v. Clapp*, 152 N. Y. 490; *People ex rel. v. Barker*, 48 App. Div. 248; *Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97; *Craig v. R. C. & B. R. R. Co.*, 39 N. Y. 404; *People v. Kerr*, 27 N. Y. 188; *Milhau v. Sharp*, 27 N. Y. 611; *People v. Cassidy*, 46 N. Y. 46; *People v. O'Brien*, 111 N. Y. 1.)

William H. Page, Jr., for Twenty-third Street Railroad Company *et al.*, respondents. The legislature of this State cannot appoint or authorize central authorities to appoint any local officer, nor can the legislature create State officers to perform an inherently local function of government. (*Sheboygan v. Parker*, 3 Wall. 93; *Matter of Mayor, etc.*, 99 N. Y. 569; *People ex rel. v. State Bd. of Canvassers*, 129 N. Y. 360; *Rathbone v. Wirth*, 150 N. Y. 459; *People v. Mosher*, 163 N. Y. 32; *People v. Bull*, 46 N. Y. 57; *People v. McKinney*, 52 N. Y. 374; *People v. Crooks*, 53 N. Y. 648; *People v. Foley*, 148 N. Y. 677; *People v. Acton*, 48 Barb. 524; *Matter of Brenner*, 170 N. Y. 185.) The function of assessing property—of perfecting a valuation of property as a basis of taxation—is to be exercised exclusively
438 by local officers, and, therefore, the officers who exercise that function in New York city must be "city officers" within the meaning of the "home rule" provision of the State constitution.

(*People v. Raymond*, 37 N. Y. 428.) The effect of the special franchise tax act is to deprive the local assessor of the function of assessing taxable property, and is, therefore, unconstitutional. (*People ex rel. v. Priest*, 169 N. Y. 432; *People v. Hastings*, 29 Cal. 449.) The history of the assessment of taxable property in New York State shows conclusively that the function of assessment has always been regarded as a purely local function, and it is impossible to suppose that the people intended to confer upon the legislature the power to interfere with this immemorial custom. (1 Colonial Laws, 14, 61, 131; 2 Colonial Laws, 269; 3 Colonial Laws, 577; 4 Colonial Laws, 419; 5 Colonial Laws, 858; *Goodell v. Jackson*, 20 Johns. 693; *Matter of Allison v. Welde*, 172 N. Y. 421; *People ex rel. v. Potter*, 47 N. Y. 375; *Pope v. Phifer*, 3 Heisk. 682.) This court has upheld the right of the legislature to interfere with local administration of certain State police powers. (*People ex rel. v. Draper*, 15 N. Y. 532; *Metro. Bd. of Excise v. Barrie*, 34 N. Y. 657.) But the assessment of property as a basis of taxation has always been as a matter of fact, and has been held to be as a matter of law, exclusively a local function of government. (*People v. Raymond*, 37 N. Y. 428.) Special franchises must be valued by a local officer, because the special franchise tax act provides for the imposition of a property tax, and not a license fee. (*Matter of Swift*, 137 N. Y. 77.) The contention that the so-called "special franchise" constitutes a new species of property, with the characteristic distinguishing features that it is partly intangible and not localized does not warrant its assessment by a State official. (*City of Buffalo v. Le Conteulx*, 15 N. Y. 451; *M. S. Bank v. City of Rochester*, 37 N. Y. 365; Cooley's Const. Lim. [6th ed.] 220.)

Frank H. Platt for Consolidated Gas Company of New York, respondent. The special franchise tax law taxes only the rights of a company to use streets, and its tangible structures in the streets used in connection with those rights. The tax is laid on no other property or right. The valuation must be of the special franchise, separate from all other rights and property. (*People ex rel. v. Dolan*, 126 N. Y. 166.) The considerations which influenced the commissioners in making their assessment of the company's special franchises afforded no true test of the value of those special franchises, and resulted in no actual valuation thereof. The assessment was a mere arbitrary determination. (*People ex rel. v. Gauley*, 29 N. Y. S. R. 135; *City of Syracuse v. Stacy*, 45 App. Div. 249; *People ex rel. v. Barker*, 146 N. Y. 304; *People ex rel. v. Coleman*, 126 N. Y. 433; *State R. R. Tax Cases*, 92 U. S. 575; *C., C., C. & St. L. R. R. Co. v. Backus*, 154 U. S. 439; *A. E. Co. v. Ohio State Auditor*, 165 U. S. 194; *People ex rel. v. Barker*, 139 N. Y. 55; 141 N. Y. 251; *People ex rel. v. Barker*, 165 N. Y. 305.) The valuation of property according to some proper principle of valuation is essential to the validity of an assessment, and, as the valuation of the State board was a mere arbitrary determination, the assessment should be set aside. (*Lee v. Parry*, 4 Den. 125; *Doughty v. Hope*, 3 Den. 594; *Powell v. Tuttle*, 3 N. Y. 396; *People v. Supervisors*, 11 N. Y. 563; *Middletown v. Berlin*, 18 Conn. 189; Cooley on Taxation, 353, 354;

439

Woodman v. Auditor-General, 52 Mich. 28; *Greenough v. Fulton Coal Co.*, 74 Penn. St. 486; *People v. Hastings*, 29 Cal. 449; *People ex rel. v. Coleman*, 126 N. Y. 433; *People v. Weaver*, 100 U. S. 539.) The company is aggrieved by the assessment, and has shown itself entitled to relief. (*People ex rel. v. Barker*, 148 N. Y. 70; *People ex rel. v. Coleman*, 126 N. Y. 433; *People ex rel. v. Barker*, 146 N. Y. 304; 152 N. Y. 417; *People ex rel. v. Dederick*, 161 N. Y. 195; *People ex rel. v. Barker*, 139 N. Y. 55.) There is no method by which the value of a special franchise can be ascertained. (*People ex rel. v. Dolan*, 126 N. Y. 166; *People ex rel. v. Clapp*, 152 N. Y. 490; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. F. S. S. R'y Co.*, 50 N. Y., 206; *Zollikoffer v. Havemeyer*, 2 Hun, 300; *Matter of Adams*, 141 N. Y. 297; *Matter of B., H. T. & W. R. Co.*, 22 Hun, 176; *People ex rel. v. Com'rs*, 104 N. Y. 240; *State R. R. Tax Cases*, 92 U. S. 575; *C., etc., R. R. Co. v. Backus*, 154 U. S. 439.) As there is no method of ascertaining the values of special franchises, the franchise tax act is impossible of execution. (*People ex rel. v. Morgan*, 168 N. Y. 1; *Hughes' Case*, 1 Bland, 46; *Ward v. Ward*, 37 Tex., 389; *Chaffee's Appeal*, 56 Mich., 244; *Drake v. Drake*, 4 Dev. 110.) The assessment of the special franchises of the company should be set aside, because the board undertook to assess all of its special franchises as one franchise instead of assessing each franchise separately. (*E. E. Co. v. N. H. E. L. Co.*, 35 Fed. Rep. 233.)

Charles A. Collin, William F. Sheehan, John L. Wells, Thomas L. Hughes, Charles H. Werner and *Charles V. Nellany* for The Brooklyn City Railroad Company, respondent. There is a clear distinction between a corporate charter, constituting the contract of incorporation, which is legislative in its character and subject to legislative alteration, amendment or repeal, and legislation constituting a business contract with a private corporation which is essentially contractual in character, and is not subject to legislative alteration, amendment or repeal, without the consent of the private corporation, party to the contract. (*Langdon v. Mayor, etc.*, 93 N. Y. 129; *People v. O'Brien*, 111 N. Y. 1.) Such franchise contracts as form part of the special franchises of these respondent corporations (whether such franchise contracts are constituted directly by State legislation accepted by the corporations, or by municipal ordinance, authorized by the legislature and in like manner accepted by the corporations) are business contracts, protected by the Federal Constitution from impairment by legislative alteration, amendment or repeal, without consent of the corporations. (*City of Walla Walla v. W. W. W. W. Co.*, 172 U. S. 1.) The taxing power cannot be invoked by the State to raise itself above the position of a private person, as regards the sacred
441 observance of its business contracts. (*Murray v. City of Charleston*, 96 U. S. 432; *Hartman v. Greenhow*, 102 U. S. 672.) In the absence of provisions in the franchise contract itself, reserving the right of the State or municipality to alter, amend or repeal the contract, neither the State nor the municipality can, without the consent of the grantee in the franchise contract, either by State or mu-

nicipal legislation, or by State constitutional amendment, change the terms of the franchise contract so as to avoid an express stipulation therein on the part of the municipality. (*City of Walla Walla v. W. W. W. W. Co.*, 172 U. S. 1; *V. W. Works Co. v. Vicksburg*, 185 U. S. 65; *L. F. El. & W. Co. v. City of Little Falls*, 102 Fed. Rep. 663; *N. O. G. L. Co. v. L. L., etc., Co.*, 115 U. S. 650; *N. O. W. W. Co. v. Rivers*, 115 U. S. 674; *L. G. Co. v. C. G. L. Co.*, 115 U. S. 674; *S. T. W. W. Co. v. N. O. W. W. Co.*, 120 U. S. 64; *Am. W. W. Co. v. H. W. Co.*, 115 Fed. Rep. 171; *C. R'y Co. v. C. S. R'y Co.*, 166 U. S. 557; *B. C. R. R. Co. v. B. C. R. R. Co.*, 32 Barb. 358.) The taxation of the franchise contracts of public service corporations where the right to impose such tax is not expressly or impliedly reserved in the franchise contracts would be an impairment of the obligation of the contracts, and would, therefore, be unauthorized and void. (*Mayor, etc., v. S. A. R. R. Co.*, 32 N. Y. 261; 34 Barb. 41; *Mayor, etc., v. T. A. R. R. Co.*, 33 N. Y. 42; *Stein v. Mayor, etc.*, 49 Ala. 362; *Los Angeles v. L. A. W. Co.*, 61 Cal. 65; *Los Angeles v. L. A. W. Co.*, 177 U. S. 588; *S. T. Co. v. City of Medford*, 115 Fed. Rep. 202; *Gordon v. Appeal Tax Court*, 3 How. [U. S.] 133.) The failure of the special franchise tax law to indicate any principle or method for ascertaining the value of the intangible property included in the special franchise, the failure of the State board to attempt any separate valuation of the intangible property and its failure to adopt or proceed upon any principle or method of valuing the totality of intangible and tangible property together constituting the special franchise, and
442 necessarily the substitution therefor of speculation and guesswork in place of judgment in making such valuation amounted to such an absence of quasi-judicial action as to constitute the taking of property without due process of law; and if the statute contemplates such a procedure, the statute itself is unconstitutional for the same reason. (*People ex rel. v. Barker*, 48 App. Div. 248; 152 N. Y. 417; *People ex rel. v. Clapp*, 152 N. Y. 490; *People ex rel. v. Adams*, 125 N. Y. 471; *People ex rel. v. Coleman*, 126 N. Y. 433; *Marsh v. Bd. of Suprs. of Clark Co.*, 42 Wis. 502; *Goff v. Bd. of Suprs.*, 43 Wis. 55; *People v. Weaver*, 100 U. S. 539; *Woodbridge v. Detroit*, 8 Mich. 274; *People v. S. F. S. Union*, 31 Cal. 132.) The State board failed to give the respondent corporations such a hearing as due process of law requires. (*Hager v. Reclamation Dist.*, 111 U. S. 701.)

William N. Dykman for Coney Island and Brooklyn Railroad Company, respondent. The special franchise on Ocean avenue and Fort Hamilton avenue, formerly owned by Prospect Park and Flatbush Railroad Company, should be separately assessed from the special franchise extending from Prospect park to Fulton ferry. (*People v. O'Brien*, 111 N. Y. 1.) The commissioners have adopted an erroneous method of assessment. (*People ex rel. v. Barker*, 152 N. Y. 417.)

John C. Tomlinson and *Edgar J. Kohler* for The New Amsterdam Gas Company, respondent. Things or rights may be property in a legal sense and may have value, and yet that value not be ascertainable in dollars and cents, or capable of admeasurement for the pur-

pose of ad valorem taxation. (*Perry v. City of Big Rapids*, 67 Mich. 146; *Dart v. Woodhouse*, 40 Mich. 399; *Tax Com'rs v. Holiday*, 150 Ind. 216; *People ex rel. v. Clapp*, 152 N. Y. 490; *People ex rel. v. Neff*, 19 App. Div. 585; *H. B. Co. v. Kentucky*, 166 U. S. 150.) A special franchise considered as a distinct piece of property, is in no proper or legal sense capable of valuation, and an assessment thereof
443 cannot be sustained upon the ground that a special franchise, while not susceptible of an accurate admeasurement of value, nevertheless admits of a sufficiently close approach to a correct valuation to suffice for purposes of taxation. (*Taylor v. L. & N. R. R. Co.*, 86 Fed. Rep. 350.)

VANN, *J.*:

These appeals were argued together and the questions of law presented are common to all the proceedings. The only questions peculiar to any case were questions of fact, which have been finally disposed of by the concurrent action of the courts below, as they united in adopting the facts as found by the referee. The main discussion at our bar, as well as in the four opinions written in the appellate division, related to the question whether the statute under which the assessments were made violates that part of the constitution which provides for home rule in certain political divisions of the State. In order to answer this question it will be useful to inquire: (1) What does the constitution prohibit; (2) what does the statute command, and (3) what have the courts held as to the validity of other statutes relating to similar subjects?

The principle of home rule, or the right of self-government as to local affairs, existed before we had a Constitution. Even prior to Magna Charta some cities, boroughs and towns had various customs and liberties which had been granted by the Crown or had subsisted through long user, and among them was the right to elect certain local officers from their own citizens and, with some restrictions, to manage their own purely local affairs. These customs and liberties, with other rights, had been so often trampled upon by the king as to arouse deep hatred of centralization of power, and we find among the many grants of the Great Charter that "the city of London shall have all its ancient liberties and its free customs as well by land as by water. Furthermore, we will and grant that all other cities and burghs and towns * * * shall have all their liberties and free customs." (Cap. 13.) "All evil customs * * * shall immediately be enquired into by twelve knights of the same
444 county, upon oath, who shall be elected by good men of the same county," and after inquisition made "they shall be altogether destroyed by them, never to be restored, provided this be notified to us before it is done." (Cap. 48.) After this marvelous statute, rights, which before had rested largely on custom, rested on law, with a guaranty against violation by the amazing covenant of King John that if he refused redress for an "excess committed" his subjects should be released from their allegiance and at liberty to make war upon him, "saving harmless our person and the per-

sons of our queen and children and when it hath been redressed they shall obey us as they have done before." (Cap. 61.)

The rights thus secured after a long struggle and by great pressure, although at times denied and violated by the ruling monarch, were never lost, but were brought over by the colonists the same as they brought the right to breathe, and they would have parted with the one as soon as the other. The liberties and customs of localities reappear on a novel and wider basis in the town meetings of New England and the various colonies, including the colony of New York. The right of the inhabitants of townships and manors to meet at stated times in public town meetings, elect town officers and transact town business, was well established while we were a colony and was recognized by different statutes enacted by the governor, council and General Assembly. (Van Schaack, chaps. 1201, 1224, 1419, 1448, 1454, 1459, 1460, 1499, 1536 and 1562; Livingston & Smith, chaps. 43 and 654.)

The business transacted at the town meeting related to highways, care of the poor, and matters of purely local concern. It was confined to the affairs of a small district and was clearly separated from public matters of interest to the colony at large. The officers elected, generally by *viva voce* vote, were supervisors, assessors, collectors, constables, commissioners of highways and overseers of the poor. The powers and duties of these officers were regulated by statute, but the right to select them resided in the people of the locality and was stubbornly insisted upon as inviolable.

445 Such was the state of affairs when the first constitution was adopted. While that instrument organized the State, it granted no rights to the people, but was their own creation, expressing the restraints that they desired to place upon themselves by preserving certain principles and methods of government which they wished to remain unalterable. Thus the constitution of 1777 recognized local self-government as already existing, and continued and protected it, so that it could not lawfully be departed from without changing the constitution itself. It provided that "town clerks, supervisors, assessors, constables and collectors and all other officers heretofore eligible by the people, shall always continue to be so eligible." (§ 29.) Sheriffs, coroners, loan officers, county treasurers, clerks of supervisors and justices of the peace were to be appointed. (§§ 26, 29.) Thus our earliest constitution did not create the right to elect the administrative officers of towns, but continued it as it had existed during the history of the colony while it was under the dominion of the English Crown. The only local officers mentioned by name as "eligible by the people" were town officers, and in fact almost all officers of other local divisions were appointed by central authority.

The second constitution, framed in 1821, continued the right by the general clause, applicable to county, town, city and village officers, that "all officers heretofore elected by the people shall continue to be elected; and all other officers, whose appointment is not provided for by this constitution, and all officers whose offices may be

hereafter created by law, shall be elected by the people, or appointed, as may by law be directed." (Art. 4, § 15.) Sheriffs, coroners and some other county officers were for the first time made elective.

The third constitution, drafted in 1846, continued the principle and expanded the right by the following provision: "All county officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county officers, as the legislature shall direct. All city, town and village
446 officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct." (Art. 10, § 2.) The same provision was carried forward, *ipsissimis verbis*, into our present constitution. (Art. 10, § 2.)

These and other commands of the different constitutions, when read in the light of prior and cotemporaneous history, show that the object of the people in enacting them was to prevent centralization of power in the State and to continue, preserve and expand local self-government.

This was effected through a judicious distribution of the power of selecting public officers, by assigning the choice of local officers to the people of the local divisions, and to the people generally, those belonging to the State at large. The management of the local political business of localities, whether as large as a county or as small as a village, is intrusted to local officers selected by the communities where those officers act and through which their jurisdiction extends. The principle of home rule is preserved by continuing the right of these divisions to select their local officers, with the general functions which have always belonged to the office. Unless the office, by whatever name it is known, is protected, as the courts have uniformly held, the right to choose the officer would be lost, for with his former functions gone he would not be the officer contemplated by the constitution, even if the name were retained. Unless the office or officer is mentioned *eo nomine* in the constitution, the name may be changed, or the office abolished, provided the functions, if retained at all, remain in some officer chosen by the locality. Local functions, however, cannot be transferred to a State officer. The legislature has the power to regulate, increase or diminish the duties of the local officer, but it has been stead-
447 fastly held that this power is subject to the limitation that no essential or exclusive function belonging to the office can be transferred to an officer appointed by central authority. The office may go, but the function must be exercised locally if exercised at all. While no arbitrary line is drawn to separate the powers of local and State officers, the integrity of the local office is protected, with

its original and inherent functions unimpaired. It is interference, whether direct or indirect, with the vital, intrinsic and inseparable functions of the office as thus defined and understood that the constitution prohibits. (*People ex rel. Wood v. Draper*, 15 N. Y. 532; *People v. Raymond*, 37 N. Y. 428; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *Astor v. Mayor, etc., of N. Y.*, 62 N. Y. 567; *Matter of the Mayor, etc., of N. Y.*, 99 N. Y. 569; *Matter of Gertum v. Bd. Supvrs.*, 109 N. Y. 170; *Koch v. Mayor, etc., of N. Y.*, 152 N. Y. 72; *People ex rel. Burby v. Howland*, 155 N. Y. 270; *People ex rel. Com'rs v. Board of Supvrs., Oneida Co.*, 170 N. Y. 105; *Matter of Brenner*, 170 N. Y., 185; *Matter of Allison v. Welde*, 172 N. Y. 421.)

The statute in question authorizes the assessment or valuation, for the purpose of general taxation, of all special franchises by a State board of tax commissioners appointed by the governor. (L. 1899, ch. 712.) The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the State. The general franchise of a street railroad company, for instance, is the special privilege conferred by the State upon a certain number of persons known as the corporators to become a street railroad corporation and to construct and operate a street railroad upon certain conditions. Such a franchise, however, gives the corporation no right to do anything in the public highways without special authority from the State, or some municipal officer or body acting under its authority. When a right of way over a public street is granted to such a corporation, with leave to construct and operate a street railroad thereon, the privilege is known as a
448 special franchise, or the right to do something in the public highway, which, except for the grant, would be a trespass.

The statute, which is an amendment of the general tax law, declares, in substance, that the right, authority or permission to construct, maintain or operate some structure, intended for public use, "in, under, above, on or through streets, highways or public places," such as railroads, gas pipes, water mains, poles and wires for electric, telephone and telegraph lines, and the like, is a special franchise. For the purpose of taxation such a franchise is made real estate and is "deemed to include the value of the tangible property of a person, copartnership or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise and taxed as a part thereof." (§ 2, clause 3.) This includes nothing but what is in the street, directly or indirectly, and excludes power houses, depots and all structures without the lines of the street. The taxes thus imposed are for general purposes, are collected in the same way, and used for the same objects as other taxes upon the general assessment roll.

Prior to the passage of this act general franchises had been taxed for the benefit of the State under a valuation made by a State officer, with the sanction of the courts. (L. 1896, ch. 908, §§ 182, 190; *People ex rel. W. & H. Co. v. Roberts*, 154 N. Y. 101.) Special franchises, however, had never been lawfully assessed either by local or State authority, but were made taxable property by the act before us for

the first time in the history of the State. (*People ex rel. Manhattan R. R. Co. v. Barker*, 146 N. Y. 304; *People ex rel. Brooklyn City R. R. Co. v. Neff*, 19 App. Div. 590; affirmed on opinion of Cullen, J., below in 154 N. Y. 763.) The right to assess special franchises by central authority is challenged as a violation of the principle of home rule embodied in the constitution and especially the right to assess the tangible property annexed thereto and included therein by the act, because the latter is withdrawn from the jurisdiction of the local assessors by whom it had been theretofore assessed.

449 Every presumption is in favor of the constitutionality of an act of the legislature and, if the constitution and the act can be reasonably construed so as to enable the latter to stand, it is the duty of the courts to give them that construction; still, it is none the less their duty to adjudge the statute void if it is in plain conflict with the real intent of the fundamental law, when considered in the light of history and in all its aspects. (*Sweet v. City of Syracuse*, 129 N. Y. 316; *People ex rel. Sinkler v. Terry*, 108 N. Y. 1.)

What was the situation that confronted the legislature when it passed this statute to raise money for the support of government?

The governor had officially announced that "the farmers, the market gardeners, and the mechanics and tradesmen having small holdings, are paying an improper and excessive portion of the general taxes." The legislature wished to distribute this burden in a just and equitable manner, to take part of the load from those who carried more than their share and to relieve the farms from some of the effects of depreciation in value through competition with the cheap and fertile lands of the West. It found property scattered all over the State worth nearly two hundred millions of dollars, which was not taxed at all and had never been taxed. This property consisted wholly of special franchises, or privileges given by the State, mainly to corporations furnishing to the public transportation, water, light and other necessities or conveniences of daily life. It had grown rapidly in extent and value during recent years. Its value rested upon the right to use in some manner the public highways of the State, but it was intangible, and doubtless for this reason had never been brought under the taxing power. The legislature also found certain tangible property, which was subject to taxation, situated in the public streets and used only in connection with and as a part of the intangible property not taxed, and of no substantial value except when so used. It found that the valuation of this new kind of property, intangible, invisible and elusive, but of great value, would be attended with peculiar difficulties, which

450 would require a degree of knowledge and skill not possessed by local assessors, but belonging only to experts who had long and carefully studied the subject of taxation in all its varied aspects. The problem was to place a just and adequate value upon a right capable of valuation, but which was unseen, without form or substance, and, as it were, the mere breath of the legislature. It was a new problem that had never arisen before during the history

of the State, and it was to be solved, not to meet local needs, but an exigency of State.

How did the legislature deal with this situation?

It created a new system of taxation, brought within its range a new character of property and assigned the duty of making the valuation to the State Board of Tax Commissioners, composed of tax experts already in office, whose sole duty related to the subject of taxation, in all its phases, throughout the entire State. It made the tax commissioners assessors of this new kind of property known as special franchises, clothed them with power to compel the owners to furnish under oath, in addition to a general report containing many details, such information as they called for; authorized them to call upon the local assessors for all facts that they could furnish and to summon aid from all available sources; required them to give notice to the owner affected and an opportunity to be heard, and provided a remedy for review by the courts of every assessment as soon as it was filed. It commanded that all sums, in the nature of a tax, paid by the owner of a special franchise to a municipality for its exclusive use, should be deducted from the tax imposed for local purposes, and exempted the tangible property situated in public highways, and used in connection with the special franchise, from all other forms of taxation. (§§ 2, 42, 43, 44, 45, 46.) The new kind of property was termed real estate, just as it might have been termed personal property, or neutral property, without changing its nature, which was such as local assessors had never dealt with.

The statute should be considered in the light of the circumstances existing when it was passed, which were extraordinary and
451 unprecedented. The system thus created had never been known before, and, as its main subject, the act dealt with special franchises, which had never been taxed before. Property unknown as the subject of taxation to the framers of any of our constitutions was brought into the system, which required new methods of valuation and the exercise of functions which had never belonged to local assessors. The property was *sui generis*, and from its nature could not be valued by local officers. Unless it escaped taxation in the future as it had in the past, it was necessary to commit the power to other officers with new functions, wider experience and greater opportunities for observation, who would be able to grasp the new scheme of taxation as a whole. We should not be misled by the terms "valuation" or "assessment," as the simple exercise of judgment, for no work can be done without that, but should compare the intrinsic nature of the functions exercised by the local assessors for time out of mind with those intrusted to the State tax commissioners, which had never been committed to any board or officer before.

The local assessors dealt with tangible property, which could be seen and was open to the judgment of ordinary men, or with written evidence of debts or contracts the value of which could be easily computed. It was their habit to measure, weigh and count; to learn the market value from current sales; to pass upon physical

and material property which they were accustomed to own, rent or use, and with which they were familiar in their daily life. They saw it, knew it and could judge as to its value. It was before their eyes and they could act upon it directly, without resort to complicated computations.

On the other hand, the valuation of special franchises had never been attempted before, but presented a new field of action and called for the exercise of new and different functions. They could not be seen, handled, measured, weighed or counted. They were specialties and had no market value. There were no sales to guide and no experience from ownership, rental or use to rely upon. The
452 new property is real estate in name, but not in reality, for it is a mere privilege to do something in public streets and places not permitted to citizens generally. While local in a narrow sense it is unconfined in its real nature, for it depends largely on the earning capacity of a going concern, frequently with several special franchises, but with no means of determining the amount earned by each. The value depends upon so many conditions, existing, frequently, in localities widely separated and upon such a complication of facts and figures that the valuation cannot be safely intrusted to men of common knowledge and experience. What greater calamity in the shape of taxation could threaten the vast interests involved than to intrust this important subject to unskilled and incompetent men, some of them willing it may be not only to protect their own localities at the expense of others, but to oppress corporations and favor individuals? The burden could not be distributed equally for each local board would have its own method and theory. Uniform action would be impossible and conflict and confusion would result. A wider view, a different kind of judgment, a balancing of localities and figures, an adjustment and equalization of burdens and an exercise of functions not local in nature were required to meet the situation. As we said in a recent case: "It is no disparagement of the capacity and intelligence of the average assessor to say that it would present to him a problem incapable of accurate solution and a rule of action in the performance of his official duty impossible in practice." (*People ex rel. D., L. & W. R. R. Co. v. Clapp*, 152 N. Y., 490, 495.)

The legislature also brought in as an incidental part of the system some tangible property which had been previously assessed by local authority. No tangible property, however, was affected, except such as was situated in the public highways and was so incidental to and dependent upon the special franchises as to have no substantial value unless used in connection with them. The relation between the intangible right to run cars in the streets and the tangible property in the rails to run the cars on, is so intimate as to be
453 inseparable in any practicable system of estimating values. Of what value are poles, strung with wires, standing in the street, without a special franchise to use them to carry electricity or send the mysterious message? What are appliances worth, when made for a special purpose, if they cannot be used for that purpose?

What are rails and ties worth, when so fastened to the land in a public highway as to be legally a part of it, without a special franchise to place and use them *there* as part of a railroad? All the mains and pipes, poles and wires, rails and ties of the relators, when separated from their special franchises, have no value except as firewood or old iron. Their only substantial value is the right to use them in connection with the franchise, and, hence, they are incidental to the franchise. As part of the franchise they are worth something, but severed from it nothing to speak of. Suppose a street railroad company should forfeit its special franchise by a violation of the grant, what would its rails and ties be worth? They would cease to exist as rails and ties, and would become simply so much old material and even the title would vest in the owner of the fee. The expense of grading, placing them in position and paving around them, which is a large part of the original cost, would cease to be an investment and would be property no longer. They are worth virtually nothing except for railroad purposes and a railroad cannot occupy a street without a special franchise. Separate them from the franchise by taking away the street privilege, and they are destroyed. Their only value as rails and ties, as distinguished from so much old wood and iron, is gone. Taking the broad and practical view of the subject, which the legislature had the right to take in creating the new system, they have no assessable value worthy of notice, except through the actual and constant use made of them as incidental to the special franchises. The value of either resides in the union of both and can be practically ascertained only by treating them as a unit. Unless assessed together, both cannot be adequately assessed. A man of judgment, in valuing a wagon
454 and especially in estimating its earning capacity, does not pass upon the body, wheels, top and tongue separately. We regard the tangible property as an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which as a going concern can neither be assessed nor sold to advantage, except as one thing, single and entire. (*People v. O'Brien*, 111 N. Y. 1; *Gue v. Tide Water Canal Co.*, 24 How. [U. S.] 257; *Hammock v. Loan and Trust Co.*, 105 U. S. 77; *Buncombe County Commissioners v. Tommey*, 115 U. S. 122.)

The function of assessing a special franchise does not in its nature belong to a county, city, town or village, for it has never been exercised by officers of such localities, but to the State, by which it is now exercised for the first time. It is not exclusively local in character and home rule applies only to functions peculiar to localities. It was unknown to our forefathers who brought over primitive home rule, to the colonists who preserved or to the founders of the State who developed it. It is no part of local self-government as known to history, or to learned judges who have written upon home rule in the past. It did not come within the experience of former times and was not contemplated by the framers of our constitutions. They kept purely local affairs under local control, but this is not local in intrinsic character, for the power to be exercised is not confined to

the limits of one community. While some special franchises are within a single tax district, others extend through several and sometimes into different towns, cities, and villages. The legislature could not make a law for each case, and in bringing the new system into operation it provided by general rule for all cases of the same general character, whether then existing or expected in the future.

Moreover, a special franchise, now confined to one tax district, may by expansion, through merger, consolidation, leasing and the like, extend into other tax districts. Such an enlargement is open to all, has been the experience of many and may be the experience of all. The same corporation may have many special franchises, continuous or separate, yet they are all practically one, because they all belong to one system, the earning capacity of which may be ascertained, but not that of each special franchise independent of the others. By removing a central franchise, the line is broken and the value of all seriously impaired. The combination of all into a single enterprise gives the highest, if not the only value to each. What would a franchise in a town be worth with no right to enter a city or village? While the strength of the chain is in the links, the value of the links is in the chain. Hence, a franchise is not essentially local in character and may require action, observation and estimate beyond the lines of a single tax district, or the accustomed jurisdiction of local assessors. An examination of the books of the corporation may be necessary in making the valuation, yet they may not be kept in the municipality of the assessors' residence. A highway may be local, but the title thereto is not, for whether a fee or an easement it is held in trust for the people at large, represented by the State, which has control of the streets and of the erections therein. (*People v. Kerr*, 27 N. Y. 188.) The franchise is the right to put something in the highway and use it there, and if the right fails, the title to what was thus placed goes with the general title.

The special franchises of a railroad in operation from a city into suburban towns may be properly treated as an aggregation, without a precise *situs*, as one piece of property producing a gross income, as a single subject of valuation, like all the personal property of an individual, from one end of the line to the other, although the amount when ascertained must be apportioned and distributed among the several tax districts affected (§ 42). This can make no difference to the company, for it has only so much to pay in any event, and it shows that the work of valuation is not local, but general in its character, and that it is a matter of central rather than municipal concern. It affects the general public rather than the people of a community. The subject is one that local officers cannot handle, because they cannot consider it as a whole by going without their precincts, but must stop at the boundaries of their several
455 districts. They cannot make the distribution among localities interested in the special franchises. Local assessors still remain local assessors, with every accustomed function intact and unimpaired. Local self-government is untouched and there is no

invasion of local functions. While special franchises were known when the later constitutions were adopted, they were not then known as taxable property. The office of assessor of special franchises was then unknown. It is not local in nature, but is a new office with new functions adapted to property of a new kind and differing in principle from any ever dealt with by local assessors. Property created by the legislature and never intrusted by it to the local assessors cannot with propriety be said to have been taken away from them.

The entire taxing power belongs to the legislature and not a dollar can be raised for local or general purposes, to carry on self-government in localities or in the State, or to provide for the public safety, order or health except by its authority. This supreme power should be considered in connection with the home rule provision of the constitution, and neither should be so construed as to embarrass or cripple the other. Home rule, as understood and practiced in the past, giving to localities the right to govern themselves, but not to hamper the government of the State, should be carefully protected from open attack or indirect invasion. Shadows, however, should give way to substance, and the right to create a new system of taxation and bring in property of a new character, hitherto untaxed, with some other property incidental thereto and worthless without it, cannot, as we think, be denied upon principle and should not be withheld from the legislature unless required by some controlling decision of the court.

While *is* is difficult to classify all the authorities relating to the subject of home rule, the most of them fall into convenient groups. At the head of the first class stands the celebrated judgment of Chief Judge Denio in *People ex rel. Wood v. Draper* (15 N. Y. 532). In that case the statute combined four counties into one police
456 district, invested five police commissioners appointed by the governor, acting as a board with the mayors of two cities in the district, with all the powers previously belonging to certain local officers of said cities respectively. The new board was authorized to appoint and control all the policemen, who were to act in any part of the district, regardless of residence or county lines. The validity of the act was upheld upon the ground that the commissioners thus appointed were not city officers, although it was strongly challenged at the bar and by a vigorous dissenting opinion, as a violation of the home rule provision of the constitution.

Similar acts creating a new system by erecting a metropolitan fire district, a metropolitan health district, a metropolitan board of excise and a capital police district, each embracing the territory of two or more municipal divisions of the State, were also sustained, although functions formerly belonging to local officers were transferred to State officials. (*People v. Pinckney*, 32 N. Y. 377; *Metropolitan Board of Health v. Heister*, 37 N. Y. 661; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *People ex rel. McMullen v. Shepard*, 36 N. Y. 285.)

An act, however, which established a police district consisting of

a city, with a police force already organized, and "three small patches of sparsely settled territory, in all less than a square mile," was held unconstitutional as an obvious attempt to evade the restrictions relating to home rule, because it was designed for the city only, and the outside fragments could have been brought into the city if it was deemed necessary to extend police protection to them. (*People ex rel. Bolton v. Albertson*, 55 N. Y. 50.)

All these cases, except the last, involved the right to erect two or more separate and independent municipalities into a new civil division, to authorize officials appointed by the State to perform the duties formerly discharged by local officers and yet leaving the municipalities in full existence and untouched in all other respects.

Acts authorizing State officials to construct public buildings, parks and highways, the expense of which was to be paid
457 locally, have been uniformly sustained, although the power to make such improvements had been previously vested in the local authorities and it was urged that the transfer of the power was an encroachment upon local self-government. (*People ex rel. McLean v. Flagg*, 46 N. Y. 401; *Astor v. Mayor, etc., of N. Y.*, 62 N. Y. 567; *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362; *People ex rel. Com'rs v. Board of Suprs. Oneida Co.*, 170 N. Y. 105.)

To the next group may be assigned statutes which, directly or indirectly, authorized the appointment of local officers by State officials, or the legislature, or extended the terms of local officers already elected, or limited the power of local authorities in the appointment of local officers. Such legislation has been condemned as in manifest violation of home rule. (*Warner v. People*, 2 Den. 272; *Decoy v. Mayor, etc., of New York*, 36 N. Y. 449; *People v. Raymond*, 37 N. Y. 428; *People ex rel. Fowler v. Bull*, 46 N. Y. 57; *People ex rel. Williamson v. McKinney*, 52 N. Y. 374; *People ex rel. Lord v. Crooks*, 53 N. Y. 648; *Rathbone v. Wirth*, 150 N. Y. 459; *People ex rel. Balcom v. Mosher*, 163 N. Y. 32; *Matter of Brenner*, 170 N. Y. 185.) In *People v. Raymond*, which is the chief reliance of the relators, there was an absolute overthrow of the local assessor and the transfer of all his functions to a State officer, which, as the court held, deprived "the people of the city of a right secured to them by the constitution."

The remaining cases decided in this court are not readily classified, but as the validity of the statutes involved was not disturbed, no analysis thereof is necessary. (*People ex rel. Einsfeld v. Murray*, 149 N. Y. 367; *Matter of Allison v. Welde*, 172 N. Y. 421; *People ex rel. Taylor v. Dunlop*, 66 N. Y. 162; *Matter of the Mayor, etc., of N. Y.*, 99 N. Y. 569; *Matter of McPherson*, 104 N. Y. 306; *Matter of Gertum v. Bd. Suprs.*, 109 N. Y. 170; *People ex rel. Kemmler v. Durston*, 119 N. Y. 569; *Koch v. Mayor, etc., of N. Y.* 152 N. Y. 72.)

When new systems have been created for the management
458 of the indigent insane, the infliction of the death penalty or the punishment of convicts, formerly confined by sheriffs in county jails, by imprisonment in penitentiaries, no question seems to have been raised or claim made that such legislation interfered

with the principle of home rule. The absence of adjudicated cases relating to these and other subjects which might be mentioned is not without significance. It is also significant that the revisers of our present constitution, acting but a few years ago, made no change in the home rule provision, as it indicates that they were satisfied with the subject as it had been expounded by the courts and acted upon by the people.

None of the cases cited had to do with such a peculiar situation and novel conditions as faced the legislature when it passed the act to tax special franchises. Certain expressions of learned judges, used *arguendo*, in discussing the subject of home rule, are relied upon by counsel as establishing a principle that controls this case. Principles are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision. "General expressions," as the great Federal jurist once said, "are to be taken in connection with the cases in which those expressions are used." (*Cohens v. Virginia*, 6 Wheat. 264, 399.)

A more specific review of the authorities is unnecessary, for it is sufficient to state that neither singly nor collectively have they so construed the constitution as to prevent the legislature, under the circumstances existing when it sought to promote a sound public policy by passing the act in question, from creating a new system of taxation, embracing within it a new character of property including incidental additions, and committing the power of assessment to a State board of experts.

The remaining questions raised by the relators do not require elaborate consideration. We cannot sustain their position that the taxation of a special franchise impairs the obligation of a contract and thus violates the Federal Constitution. (Art. 1, § 10.)
459 The franchises are grants which usually contain contracts, executed by the municipality, but executory as to the owner. They contain various conditions and stipulations to be observed by the holders of the privilege, such as payment of a license fee, of a gross sum down, of a specific sum each year or a certain percentage of receipts, as a consideration, or "in full satisfaction for the use of the streets." There is no provision that the special franchise, or the property created by the grant, shall be exempt from taxation. Such a stipulation would be void, for no municipality has power to withdraw property from the taxing power of the State, or to provide by ordinance or contract that it shall be free for all time from the common burden which property generally has to bear. Taxation is the rule, with every presumption to support it, while exemption is an exception, with every presumption against it.

The condition upon which a franchise is granted is the purchase price of the grant, the payment of which in money, or by an agreement to bear some burden, brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the State. There is no implied covenant that property sold by the State cannot be taxed by the

State, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption. The rule of strict construction applies to State grants, and unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty. Special franchises were not taxed until by the act of 1899 amending the tax law they were added to the other taxable property of the State. This is all that the statute does, so far as the question now under consideration is concerned. No part of the grant is changed, no stipulation altered, no payment increased and nothing exacted from the owner of the franchise that is not exacted from the owners of property generally. No blow is struck at the franchise, as such, for it remains with every right conferred in full force, but, as it is property, it is required to contribute its ratable share, dependent only upon value, toward the support
460 of government. No burden is placed upon it except such as is borne by the homes of the people and money saved for support in old age.

While all attempts of municipalities to undermine or destroy franchises by changing the terms of the grant have been promptly repressed by the courts, there is no case which holds that a franchise, whether general or special, cannot be taxed the same as other private property. The relators accepted their franchises subject to the right of taxation that applies to all property in the State, and we agree with the learned referee that the special franchise tax takes nothing from the grant, exacts nothing as further compensation for the privilege and impairs no contractual obligation.

The further contention of the relators, that the act is impracticable and incapable of execution; that the special franchises should have been separately assessed; that the State Tax Commissioners adopted no rule in making the assessments; that the relators did not have a proper hearing at the time provided for review, and that due process of law was not observed in the taxation of their property, after due consideration we overrule, without further expression of reasons than already appears.

In reviewing these cases we have received great aid from the strong and exhaustive opinion of the late Judge Earl, for many years a distinguished member of this court, who, acting as referee, decided them in the first instance, after full and careful consideration of all the questions involved. It was the last judicial work of that ripe lawyer and eminent jurist, and we regard his decision as one of the most able and profound judgments ever pronounced by him during his long and useful career.

The order of the appellate division should be reversed and judgment of the special term affirmed, in each proceeding, with costs.

Parker, Ch. J., O'Brien, Bartlett, Martin, Cullen and Werner, JJ., concur.

Order reversed, etc.

461 STATE OF NEW YORK, } ss:
County of Albany, }

I, W. H. Shankland, clerk of the court of appeals of the State of New York, do hereby certify that I have compared the annexed copy of the opinion made by said court in the case of The People of the State of New York *ex rel.* New Amsterdam Gas Company, respondent, against State Board of Tax Commissioners, appellant, with the original thereof on file in this office, and find the same to be a true transcript of and from said original and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed my official seal this 29th day of June 1903.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND,
Clerk of Court of Appeals of State of New York.

462 [Endorsed:] Supreme Court of United States. People of the State of New York *ex rel.* New Amsterdam Gas Company, plaintiff in error, against State Board of Tax Commissioners, defendant in error. Opinion and certificate of clerk of court of appeals. Boardman, Platt & Soley, attorneys for plaintiff in error, 35 Wall street, New York.

Endorsed on cover: File No. 18,999. New York supreme court. Term No. 348. The People of the State of New York *ex rel.* The New Amsterdam Gas Company, plaintiff in error, *vs.* The State Board of Tax Commissioners. Filed July 7th, 1903.